TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 24 //

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

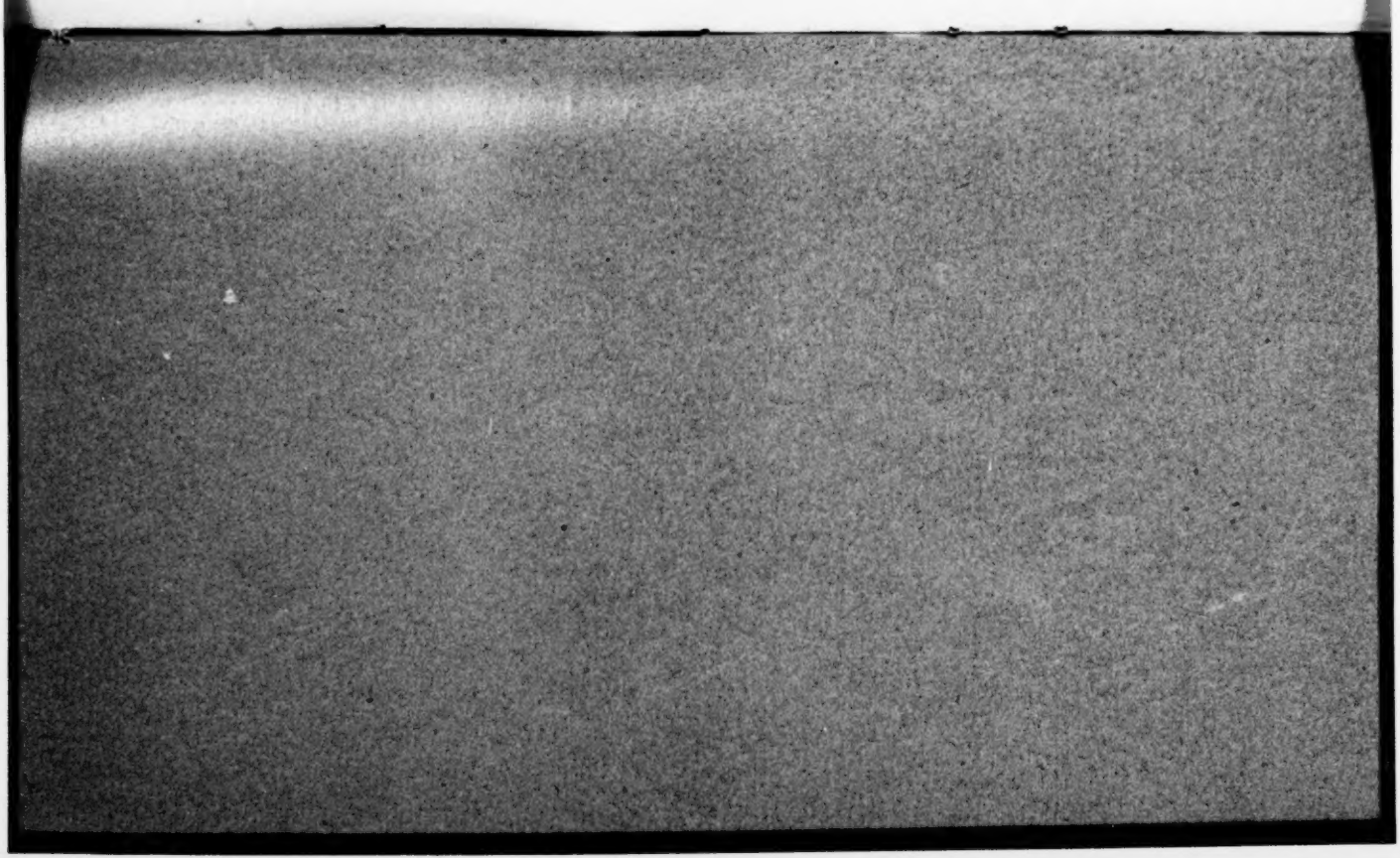
vs.

H. W. HICKMAN, JAMES COWGILL, AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED AUGUST 31, 1900.

(17,502.)



(17,502.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 127

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL, AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	1½	1
Citation	2	2
Proof of service of citation	2½	2
Citation and acknowledgment of service	3	3
Certified copy of judgment and order granting appeal	4	3
Judgment	4	4
Order granting appeal	10	8
Clerk's certificate	11	8
Order granting motion to advance	11	9
Motion to advance	11	9
Order for continuance	12	9
Stipulation to continue	12	10
Record from Cooper county circuit court	13	10
Petition	13	10
Petition for removal	16	12
Bond for removal	18	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1900.

	Original.	Print
Order to reset cause for trial	19	14
Order overruling petition for removal	19	14
Order for continuance	20	14
Order filing protest	20	15
Judgment	21	15
Bill of exceptions	27	19
Protest of defendant	27	19
Evidence for plaintiffs	31	22
Testimony of J. F. Gmelich	31	22
Fred Sauter	33	23
C. C. Bell	35	25
J. H. Brokmeyer	38	27
James Harding	38	28
Charter of Boonville bridge	41	30
Articles of incorporation of M., K. & T. R. R. Co.	45	33
Testimony of C. C. Bell (recalled)	49	36
J. H. Brokmeyer (recalled)	51	37
H. F. Sanders	52	37
F. T. Walz	53	39
James Cowgill	58	42
Joseph Flory	59	43
T. J. Hennessey	60	44
Motion for new trial	61	45
Motion in arrest of judgment	62	45
Judge's certificate to bill of exceptions	64	46
Hearing and submission	65	47
Judgment	65	47
Opinion	66	47
Order filing motion for rehearing	81	57
Motion for rehearing	82	57
Order overruling motion for rehearing	84	59
Order allowing writ of error, &c.	84	59
Petition for writ of error, &c.	85	59
Assignment of errors	87	61
Order granting supersedeas, &c.	88	62
Supersedeas bond	90	63
Clerk's certificate	92	64

1 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the April term, 1899, thereof, between H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of railroad and warehouse commissioners of the State of Missouri, respondents, and The Missouri, Kansas & Texas Railway Company, appellant, a manifest error hath happened, to the great damage of the said Missouri, Kansas & Texas Railway Company, appellant, as aforesaid, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., in not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-nine

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the central division of the western district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Central Division, for the Western District Missouri. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
JAS. B. GANTT,
Chief Justice.

1½ *Return to Writ.*

UNITED STATES OF AMERICA, *Western District of Missouri,* } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 22nd day of August, A. D. 1899.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

[Endorsed:] No. 9331. United States circuit court, western district of Missouri, central division. H. W. Hickman *et al.*, railroad & warehouse comm'rs, respondents, *vs.* Missouri, Kansas & Texas Railway Co., appellant. Writ of error to the supreme court of the State of Missouri. Filed Jul- 20, 1899. Jno. R. Green, clerk.

2 The United States of America to H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of railroad and warehouse commissioners of the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Missouri, Kansas & Texas Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, chief justice of the supreme court of Missouri, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

JAS. B. GANTT,
Chief Justice.

2½ [Endorsed:] (Original.) Supreme court of Missouri. H. W. Hickman *et al.*, railroad & warehouse comm'rs, respondents, *vs.* Missouri, Kansas & Texas Railway Co., appellant. Citation. Filed Jul- 20, 1899. Jno. R. Green, clerk.

Executed the within writ in Jackson county, Mo., upon 27th day of July, 1899, by delivering a copy of the same to the within-named James Cowgill.

ROBERT S. STONE, *Sheriff,*
By FRANK FINNCANE, *D. S.*

1 D., $1.00.

The within-named defendant in error, H. W. Hickman, being dead, I executed the within writ, in the county of Stoddard and State of Missouri, on the first day of August, 1899, by delivering a true copy thereof to Mrs. H. W. Hickman, administratrix of the estate of said H. W. Hickman, deceased.

JAMES A. EVANS,
Sheriff of Stoddard County, Missouri,
By FRED EVANS, *Dept.*

Fees	$ 50
Mileage	1 80
	$2 30

Executed the within writ, in the city of St. Louis, Missouri, on the 7th day of August, 1899, by delivering a true copy of the same to the within-named Joseph Flory.

____ ____,
Sheriff of the City of St. Louis, Missouri.

Executed the within writ, in Cole county, Missouri, on the 11th day of August, 1899, by delivering a true copy of the same to E. C. Crow, attorney of record for defendants in error.

J. J. HENDERSON,
Sheriff Cole Co., Mo.

Fee, 1.00.

3 The United States of America to H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of railroad and warehouse commissioners of the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Missouri, Kansas & Texas Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, chief justice of the supreme court of Missouri, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES B. GANTT,
Chief Justice.

I hereby acknowledge service as above.

JOSEPH FLORY,
Chairman Mo. R. R. & W. Com.

3½ [Endorsed:] Filed Aug. 21, 1899. Jno. R. Green, clerk.

I hereby acknowledge service of a copy of the within citation this 21st day of August, 1899.

JOSEPH FLORY,
One of Defendants in Error.

4 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 30th day of June, 1898, there was filed in the office of the clerk of the supreme court of the State of Missouri a copy of the judgment and order granting

an appeal from Cooper county, Missouri, in which W. H. Hickman *et al.* were respondents and The Missouri, Kansas and Texas Railway Company was appellant; which said copy of judgment and order granting an appeal are in words and figures as follows, viz:

Pleas and proceedings in the circuit court of Cooper county, Mo.

Be it remembered that at the regular October term, 1897, of said Cooper circuit court and on the third day of December, 1897, it being the twenty-second day of said term, the following, among other, proceedings were had, to wit:

H. W. HICKMAN JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Defendant.

Now, on this third day of December, 1897, this case is called for trial, and thereupon the defendant, appearing by its attorney only for that special purpose, files a protest against any trial or proceedings in this case by this court at this time in words and figures as follows, to wit:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Suing as Members of the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

5 *vs.*

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Now comes the said Missouri, Kansas & Texas Railway Company and shows to the court that within due time after the commencement of this suit it filed a proper petition and bond for the removal of this cause to the United States court for the district of Missouri in which Cooper county is situated for the reason that the said suit involved an amount in excess of two thousand dollars, exclusive of interest and costs, and that at the time of the commencement of said suit the plaintiffs were residents and citizens of the State of Missouri and the defendant a citizen of the State of Kansas, where it is incorporated, which diverse citizenship has been continued.

That this court refused to make an order removing said case; but notwithstanding, the defendant, as was its right and duty, caused a complete transcript of all the pleadings, petition, and bonds in said case to be filed in the office of the clerk of the United States circuit court for the central division of the western district of Missouri, at Jefferson City, Missouri, within the time required by law,

and that said case has been pending in said United States court ever since.

That from term to term of said court the said case has been continued at the request and for the accommodation of the plaintiffs.

That this defendant did not know that the said cause was continued on the docket of this court after the filing of the transcript aforesaid in the United States court and had no notice or intimation that the case was set on the docket for trial at any time thereafter, and especially on December 2nd, 1897, except from an incidental remark in a letter received from Mr. W. M. Williams, of Boonville, which was written in relation to other cases, and in which he said that he knew nothing about this case, and that the defendant's attorney would have to see the attorney general
6 of the State in regard to trying the case on December 2nd, as was being arranged in regard to the other cases written about. This letter was received in St. Louis on November 30th by the defendant's attorney, who had not inquired about said case and who did not then understand that there was any intention to insist upon a trial of the case in this court and regarded the matter contained in said letter as a casual remark of Mr. Williams, and, although said letter contained the farther statement that he (Mr. Williams) understood that the attorney general would be in Boonville on December 3rd, still the defendant's attorney did not construe that as meaning that there would be any effort to try the case at that time or on Dec. 2nd, on which day it now transpires the case is docketed, or that there was any claim that this court had jurisdiction to try it.

The defendant states that no pleadings have been filed in this court by defendant because of the pendency of the case in the Federal court, and that no issues have been made up in this court.

Defendant further protests that it would be unreasonable and unjust to attempt to try the case at this time, or to take a default therein without the issues having been made up, or to require the defendant to plead under the circumstances at this time, since it has not received any reasonable notice that the plaintiffs intended to abandon the case in the United States court, or to refuse to appear therein, or to insist upon the right to try the case in this court.

And the defendant farther protests and says that the petition filed by the plaintiffs does not state facts sufficient to constitute a cause of action against the defendant, and that the plaintiffs, in the preliminary steps which they took in order to lay a foundation for the commencement of this suit by them, acted in disregard of the laws of the State of Missouri and in an arbitrary and illegal manner, and without waiving its objection to the jurisdiction of this court the defendant now objects to the introduction of any evidence under the petition for that reason.

7 Without waiving its objection to the jurisdiction of this court to proceed in this case, the defendant says that it is entitled to have sufficient time in which to make the necessary preparation to make a proper presentation of the matter to the

court and to establish that this court has no jurisdiction to proceed in this cause or to entertain jurisdiction over the same, or, if the court shall hold that it has such jurisdiction, then, to enable the defendant to determine what course it will pursue and whether or not it will submit to the jurisdiction of the court or whether it will take part in the proceedings in the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding, and to the end that the defendant may make such preparation and have a reasonable time in which to determine what course it will pursue, it now respectfully asks that the court suspend any farther action in this cause until the next term of court, and, as a farther reason for such request, the defendant states that its attorney, who has had charge of said cause and is expecting to give it whatever attention may be necessary, is compelled to leave the city of Boonville on the night of December 2nd, in order to proceed at once to the city of Washington to give necessary attention to a case pending in the Supreme Court of the United States and liable to be called on December 6th or any day thereafter, and said attorney now leaves this protest and request to be filed in court on December 3rd, having prepared the same as soon as he learned that there was a serious intention on the part of the plaintiffs to attempt to force a trial in this case.

In filing this paper or in any suggestion or in making any objection or in any action hereafter, the defendant is not to be understood as in any manner or to any extent waiving its objection to the jurisdiction of this court in this case, nor as abandoning its claim that the case is now pending in the United States court aforesaid.

GEO. P. B. JACKSON,
Attorney for Defendant.

8 Which protest is by the court overruled, denied, and disregarded, and the trial ordered to proceed; to which action of the court the defendant excepts; and thereupon come the plaintiffs, by their attorney, Edward C. Crow, attorney general of the State of Missouri, and the defendant refusing to take part in the trial, the court proceeds with the same and doth hear the pleadings and evidence on the part of plaintiffs, and the same being fully considered, the court doth find that the plaintiffs are the regularly elected, duly qualified, and acting railroad and warehouse commissioners of the State of Missouri, and constitute the board empowered by law to classify and regulate railroad passenger and freight rates in the State of Missouri.

That the defendant is a railroad corporation, duly incorporated under the laws of the State of Kansas, and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railway is constructed is a part of the roadway of

the said defendant and is used as such; that said bridge is under the control and management of the said defendant; that complaint was legally made to plaintiffs as the board of railroad and warehouse commissioners aforesaid that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under authority given them as the board of railroad and warehouse commissioners of the State of Missouri, proceeded on the 16th day of July, 1895, after legal and proper notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the said bridge; that defendant belongs to the class of railroads designated by law as class "A," and that defendant is only authorized by law to charge
9 passengers at the rate of three cents per mile each; that said bridge does not exceed one mile in length; that defendant charges for carrying each local passenger over said bridge the said sum of three cents per mile, and in addition thereto makes an arbitrary charge of 25 cents for carrying each local passenger on its line of road over said bridge; that said charge of 25 cents so made, demanded, and received of each local passenger by defendant is illegal; that defendant illegally charges and collects on freights transported over said bridge and between local stations upon the line of its railway, in addition to the duly established rates for such transportation, as shown in the tariffs of rates filed by defendant in the office of plaintiffs, the sum of five cents per one hundred pounds on freights in lots of less than car-loads and two cents per one hundred pounds on freights in car-loads; that defendant was legally ordered and directed by plaintiffs that said illegal and arbitrary charges so made be discontinued; that said order of plaintiffs to defendant has been and is being by defendant ignored and disregarded, and defendant continues to charge, demand, and receive freight and passenger rates and charges in excess of those authorized by law for carrying freight and passengers on that portion of its road of which said bridge known as the Boonville bridge constitutes a part; and the court doth further find that the matters and facts set forth in plaintiffs' petition are true. Wherefore, the premises having been considered, it is ordered, adjudged, and decreed by the court that the defendant be and is forever enjoined and restrained from further demanding, charging, or receiving the said arbitrary sum of 25 cents, or any other arbitrary sum, from each local passenger over that portion of its road which consists of said bridge in addition to the legal rates of three cents per mile for each passenger so carried by defendant, and that defendant be forever restrained and enjoined from further demanding, charging, or receiving the arbitrary sum of five cents per one hundred pounds on freights of less than car-loads and two cents per one hundred pounds on
10 freights in car-loads over that portion of its road which consists of said bridge, or any other sum on said shipments, in addition to the duly and legally established rates for the transportation of freights over defendant's said road, and that plaintiffs have

and recover from defendant their costs in this behalf laid out and expended, and that execution issue therefor.

It is further ordered that defendant be served with a copy of this decree.

And afterwards, to wit, at the regular May term, 1898, of said court and on the 20th day of May, 1898, it being the fourth day of said term, the following further proceedings were had in said cause, to wit:

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Now, at this day, come the parties, by their respective attorneys, and the defendant's motion for a new trial in this cause heretofore filed herein coming on to be heard, and all and singular the premises being seen and heard and by the court fully understood, it is considered by the court that said motion be overruled, and the defendant's motion in arrest of judgment heretofore filed herein coming on to be heard, and all and singular the premises being seen and heard and by the court fully understood, it is considered by the court that said motion be overruled, and leave is by the court given the defendant to file its bill of exceptions herein on or before August 20th, 1898.

Whereupon said defendant files its affidavit for an appeal herein, and an appeal is hereby granted said defendant to the supreme court of the State of Missouri; and leave is by the court given
11 the defendant to file its bond for appeal herein in the sum of five hundred (500) dollars within ten days after the adjournment of this term of court, to be approved by the clerk thereof.

STATE OF MISSOURI, } ss:
County of Cooper, }

I, F. G. Hollman, clerk of the circuit court within and for the county of Cooper, in the State of Missouri, certify the above and foregoing to be a full, true, and complete copy of the judgment and order granting appeal in the above-entitled cause as fully as the same appears of record in my office.

In witness whereof I have hereunto set my hand and affixed the [L. S.] seal of said court. Done at office, in Boonville, county and State aforesaid, this June 24, 1898.

F. G. HOLLMAN, *Clerk.*

And afterwards, to wit, on the 24th day of December, 1898, the further following proceedings were had in said cause, viz:

H. W. HICKMAN ET AL., Resp.,
v.
M., K. & T. R'Y Co., App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to advance this cause on the docket, doth order that said motion be sustained, and that this cause be set for hearing at the January call, 1899.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, October Term, 1898.

W. H. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railway & Warehouse Commissioners of the State of Missouri, Plaintiffs,

12 *vs.*

MISSOURI, KANSAS & TEXAS RAILROAD COMPANY, Defendant.

Motion to Advance.

Now, at this day, comes Edward C. Crow, attorney general of the State of Missouri, on behalf of the above-named plaintiffs, and files this his motion to advance the above cause upon the docket, and states as his reasons therefor that, first, a speedy determination is necessary for the good of the general public; second, because the citizens of Cooper and adjoining counties and a large number of the people of the State of Missouri are materially affected by the issues therein involved, which is to require said defendant to cease the exaction of arbitrary and excessive freight and passenger charges over its line of railroad over the Boonville bridge at Boonville, Missouri.

EDWARD C. CROW,
Attorney General.

And afterwards, to wit, on the 9th day of January, 1899, the further following proceedings were had in said cause, viz:

H. W. HICKMAN ET AL., Resp.,
v.
M., K. & T. R'Y Co., App.

Come now the said parties, by attorneys, and upon their stipulation it is ordered by the court that this cause be continued to the April term, 1899.

Which said stipulation is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Vacation.

H. W. HICKMAN ET AL., Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

13 It is hereby stipulated that the above-entitled cause shall be continued to the April term, 1899, of the supreme court.

EDWARD C. CROW,
Attorney for Respondents.
GEO. P. B. JACKSON,
Attorney for Appellant.

And afterwards, to wit, on the 6th day of March, 1899, there was filed in this cause the record of the Cooper county circuit court; which said record is in words and figures as follows, viz:

In the Supreme Court of Missouri, April Term, 1899.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Appeal from Cooper circuit court.

Record.

This was an injunction suit to restrain defendant from collecting certain tolls on the bridge across the Missouri river at Boonville. It was commenced in the circuit court of Cooper county on August 17, 1895, by filing the following petition:

In the Circuit Court of Cooper County, Missouri, in Vacation, 1895.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commission-
14 ers of the State of Missouri, Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Plaintiffs state that they are the regularly elected, duly qualified, and acting railroad and warehouse commissioners of the State of Missouri, and constitute the board empowered by law to classify and regulate railroad passenger and freight rates in the State of Missouri; that the defendant is a railroad corporation, duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river, over a bridge, to the county of Howard, in the State of Missouri; that said bridge over which said

railroad is constructed is a part of the roadway of the same and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs, as the board of railroad and warehouse commissioners aforesaid, that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under the authority given them as the board of railroad and warehouse commissioners aforesaid, proceeded on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law; that said defendant belongs to the class of
15 railroad corporations designated by the laws of the State of Missouri as "class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Boonville bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents so made, demanded, and received of each local passenger by said defendant is illegal, improper, and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said railroad and warehouse commissioners, the sum of five (5) cents per one hundred pounds on freights in lots of less than car-loads and two cents per one hundred pounds on freights in car-loads; that said charges so made, demanded, and received are excessive, unauthorized, and in violation of law.

That on the 22d day of July, 1895, plaintiffs, as the board of railroad and warehouse commissioners aforesaid, after having duly considered the complaints heretofore filed against the defendant, as aforesaid, found that the same were sustained by proper and sufficient evidence, and made and entered of record an order, directed to the said defendant railway company, that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Boonville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was by said plaintiffs forwarded to the general manager of said defendant's road.

Plaintiffs state that they are informed and believe the fact to be that defendant is disregarding and ignoring said order, and is continuing, in violation of law, to charge, demand, and receive rates in excess of three cents per mile for carrying each passenger over
16 that portion of its road which consists of said bridge, and that said defendant continues to charge, demand, and receive

freight rates in excess of those authorized by law for carrying freight on that portion of its road of which said bridge over the Missouri river at Boonville constitutes a part.

Plaintiffs therefore ask that this court may issue a writ of injunction herein or such other process, mandatory or otherwise, as may seem necessary in the premises to restrain said defendant from further continuing to violate the law and the findings of said plaintiffs herein, acting as the board of railroad and warehouse commissioners aforesaid; that obedience to said order may be required of defendant, and that such other and further orders and decrees may be made in this cause as may seem upon a hearing to be right and proper in the premises.

F. R. WALKER,
Attorney General, for Plaintiffs.

In due time the defendant filed the following petition for removal to United States court:

In the Circuit Court of Cooper County, Missouri, October Term, 1895.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Petition for Removal.

Your petitioner respectfully shows that it is the defendant in the above-entitled suit; that at and prior to time of the institution of this suit the defendant was, ever since has been, and now is a corporation created and existing under the laws of the State of
17 Kansas, and that at said times and dates it was, has been, and now is a citizen of the State of Kansas and non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit at the time of the institution thereof all and each were, ever since have been, and now are citizens and residents of the State of Missouri.

That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

That the controversy in said suit is wholly betwe-n citizens of different States, to wit, between your petitioner, a citizen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then and still are citizens of the State of Missouri, and your petitioner offers herewith a bond, with good and sufficient security, for its entry in

the circuit court of the United States for the central division of the western district of Missouri on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this honorable court to proceed no farther herein, except to make an order for the removal of this case to said United States circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the central division of the western district of Missouri, and it will ever pray.

GEO. P. B. JACKSON,
Attorney for Petitioner.

18 Defendant also filed the following bond for removal:

In the Circuit Court of Cooper County, Missouri, October Term, 1895.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Warehouse and Railroad Commissioners of the State of Missouri, Plaintiffs,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Bond for Removal.

Know all men by these presents that we, the Missouri, Kansas & Texas Railway Company, as principal, and A. H. Stephens, of Cooper county, Missouri, as surety, are hereby held and firmly bound unto H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of warehouse and railroad commissioners of the State of Missouri, in the sum of $500.00; for the payment whereof, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

The condition of this obligation is such that if the Missouri, Kansas & Texas Railway Company shall enter and file, or cause to be entered and filed, in the circuit court of the United States in and for the central division of the western district of Missouri, on the first day of its next regular term, copies of all process, pleadings, or records in the above-entitled suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if the said court shall hold that the said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain under full force.

Witness our hands this — day of October, 1895.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By JAMES HAGERMAN,
General Solicitor.

19 A. H. STEPHENS.

Thereupon the circuit court of Cooper county made the following order:

October Term, 1895.

OCTOBER 21ST, 1895.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,

vs.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Now, at this day, comes the defendant in the above-entitled cause, by its attorney, and files herein its petition and bond for removal to the United States court, and it is now ordered by the court that said cause be reset for trial on October 25th, 1895.

And afterwards made the following order:

October Term, 1895.

OCTOBER 30TH, 1895.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,

vs.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

The petition for the removal of this cause to the United States court, heretofore filed, is now by the court overruled.

Thereupon defendant procured and filed in the United States circuit court at Jefferson City a transcript of the proceedings in the Cooper circuit court. Thereafter the last-named court made the following further orders:

January Term, 1896.

FEBRUARY 4TH, 1896.

"RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF Missouri

vs.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

This cause is now here continued until the next term of this court."

May Term, 1897.

MAY 18TH, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

It is now here ordered that this cause be continued until the next term of this court, upon application and cost of the plaintiff, and that defendant recover of plaintiff costs of this continuance, and have execution therefor.

October Term, 1897.

DECEMBER 3RD, 1897.

(Caption same as last above.)

"Now, at this day, comes the defendant in the above-entitled cause, by its attorney, and files herein its protest against the action of the Cooper circuit court in said cause."

Subsequently, at the October term, 1897, on December 3, 1897, the case was, over the objections of defendant, taken up for trial, defendant protesting in writing to the action of the court.

21 The trial proceeded and the court rendered the following judgment:

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Now, on this 3rd day of December, 1897, this case is called for trial, and thereupon the defendant, appearing by its attorney only for that special purpose, files a protest against any trial or proceedings in this case by this court at this time in words and figures as follows, to wit:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Suing as Members of the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Defendant.

Now comes the said Missouri, Kansas & Texas Railway Company and shows to the court that within due time after the commencement of this suit it filed a proper petition and bond for the removal

of this cause to the United States court for the district of Missouri, in which Cooper county is situated, for the reason that the said suit involved an amount in excess of two thousand dollars, exclusive of interest and costs, and that at the time of the commencement of said suit the plaintiffs were residents and citizens of the State of Missouri and the defendant a citizen of the State of Kansas,
22 where it is incorporated, which diverse citizenship has been continued.

That this court refused to make an order removing said cause, but, notwithstanding, the defendant, as was its right and duty, caused a complete transcript of all the pleadings, petitions, and bonds in said case to be filed in the office of the clerk of the United States court for the central division of the western district of Missouri, at Jefferson City, Missouri, within the time required by law, and that said case has been pending in said United States court ever since.

That from term to term of said court the said case has been continued at the request and for the accommodation of the plaintiffs.

That this defendant did not know that the said cause was continued on the docket of this court after the filing of the transcript aforesaid in the United States court, and had no notice or intimation that the case was set on the docket for trial at any time thereafter, and especially on December 2d, 1897, except from an incidental remark in a letter received from Mr. W. M. Williams, of Boonville, which was written in relation to other cases, and in which he said that he knew nothing about this case, and that the defendant's attorney would have to see the attorney general of the State in regard to trying the case on December 2d, as was being arranged in regard to the other cases written about. The letter was received in St. Louis on November 30th by the defendant's attorney, who had not inquired about said case and who did not then understand that there was any intention to insist upon a trial of the case in this court, and regarded the matter contained in said letter as a casual remark of Mr. Williams, and although said letter contained the farther statement that he (Mr. Williams) understood that the attorney general would be in Boonville on December 3d, still the defendant's attorney did not construe that as meaning that there would be any effort to try the case at the time or on December 2d, on which day it now transpires the case is docketed,
23 or that there was any claim that this court had jurisdiction to try it.

The defendant states that no pleadings have been filed in this court by defendant because of the pendency of the cause in the Federal court, and that no issues have been made up in this court.

Defendant further protests that it would be unreasonable and unjust to attempt to try the case at this time or to take a default therein without the issues having been made up or to require the defendant to plead under the circumstances at this time, since it has not received any reasonable notice that the plaintiffs intended to abandon the case in the United States court or to refuse to appear therein or to insist upon the right to try the case in this court.

And the defendant further protests and says that the petition filed by the plaintiffs does not state facts sufficient to constitute a cause of action against the defendant, and that the plaintiffs in the preliminary steps which they took in order to lay a foundation for the commencement of this suit by them acted in disregard of the laws of the State of Missouri and in an arbitrary and illegal manner, and without waiving its objection to the jurisdiction of this court the defendant now objects to the introduction of any evidence under the petition for that reason.

Without waiving its objection to the jurisdiction of this court to proceed in this case, the defendant says that it is entitled to have sufficient time in which to make the necessary preparation to make a proper presentation of the matter to the court, and to establish that this court has no jurisdiction to proceed in this cause or to entertain jurisdiction over the same, or if the court shall hold that it has such jurisdiction, then, to enable the defendant to determine what course it will pursue and whether or not it will submit to the jurisdiction of the court or whether it will take part in the proceedings in the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding, and to the end that the defendant may make such prep-
24 aration and have a reasonable time in which to determine what course it will pursue, it now respectfully asks that the court suspend any further action in this cause until the next term of court, and as a farther reason for such request the defendant states that its attorney, who has had charge of said cause and is expecting to give it whatever attention may be necessary, is compelled to leave the city of Boonville on the night of December 2d, in order to proceed at once to the city of Washington to give necessary attention to a case pending in the Supreme Court of the United States and liable to be called on December 6th or any day thereafter, and said attorney now leaves this protest and request to be filed in court on December 3rd, having prepared the same as soon as he learned that there was a serious intention on the part of plaintiffs to attempt to force a trial in this case.

In filing this paper or in any suggestion or in making any objection or in any action hereafter the defendant is not to be understood as in any manner or to any extent waiving its objection to the jurisdiction of this court in this case nor as abandoning its claim that the case is now pending in the United States court aforesaid.

GEO. P. B. JACKSON,
Attorney for Defendant.

Which protest is by the court overruled, denied, and disregarded and the trial ordered to proceed; to which action of the court the defendant excepts, and thereupon come the plaintiffs, by their attorney, Edward C. Crow, attorney general of the State of Missouri, and the defendant refusing to take part in the trial, the court proceeds with the same and doth hear the pleadings and evidence on the part of the plaintiffs, and the same being fully considered, the

court doth find that the plaintiffs are the regularly elected, duly qualified, and acting railroad and warehouse commissioners of the State of Missouri and constitute the board empowered by law to classify and regulate railroad passenger and freight rates in the State of Missouri; that the defendant
25 is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railway is constructed is a part of the roadway of the said defendant and is used as such; that said bridge is under the control and management of the said defendant; that complaint was legally made to plaintiffs, as the board of railroad and warehouse commissioners aforesaid, that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under authority given them as the board of railroad and warehouse commissioners of the State of Missouri, proceeded, on the 16th day of July, 1895, after legal and proper notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the said bridge; that defendant belongs to the class of railroads designated by law as class "A," and that defendant is only authorized by law to charge passengers at the rate of three cents per mile each; that said bridge does not exceed one mile in length; that defendant charges for carrying each local passenger over said bridge the said sum of three cents per mile, and in addition thereto makes an arbitrary charge of 25 cents for carrying each local passenger on its line of road over said bridge; that said charge of 25 cents so made, demanded, and received of each local passenger by defendant is illegal; that defendant illegally charges and collects on freights transported over said bridge and between local stations upon the line of its railway, in addition to the duly established rates for such transportation, as shown in the tariffs of rates filed by defendant in the office of
26 plaintiffs, the sum of five cents per one hundred pounds on freights in lots of less than car-loads, and two cents per one hundred pounds on freight in car-loads; that defendant was legally ordered and directed by plaintiffs that said illegal and arbitrary charges so made be discontinued; that said order of plaintiffs to defendant has been and is being by defendant ignored and disregarded and defendant continues to charge, demand, and receive freight and passenger rates and charges in excess of those authorized by law for carrying freight and passengers on that portion of its road of which said bridge known as the Booneville bridge constitutes a part; and the court doth further find that the matters and facts set forth in plaintiff's petition are true. Wherefore, the premises having been considered, it is ordered, adjudged, and de-

creed by the court that the defendant be and is forever enjoined and restrained from further demanding, charging, or receiving the said arbitrary sum of 25 cents or any other arbitrary sum from each local passenger over that portion of its road which consists of said bridge, in addition to the legal rate of three cents per mile for each passenger so carried by defendant, and that defendant be forever restrained and enjoined from further demanding, charging, or receiving the arbitrary sum of five cents per one hundred pounds on freights of less than car-loads and two cents per one hundred pounds on freights in car-loads over that portion of its road which consists of said bridge, or any other sum on said shipments in addition to the duly and legally established rates for the transportation of freights over defendant's said road, and that plaintiffs have and recover from defendant their costs in this behalf laid out and expended, and that execution issue therefor.

It is further ordered that defendant be served with a copy of this decree."

The defendant moved for a new trial, which was refused, and in accordance with the leave granted by the court defendant
27 filed the following bill of exceptions:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Be it remembered that at the October term of the Cooper circuit court, it being December 3, 1897, before the Hon. Dorsey W. Shackleford, judge of said court, the following proceedings were had:

Appearances: Edward C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for plaintiffs.

The defendant appeared specially and only for the purpose of protesting against any action in this case by this court at this time, and filed the following protest:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, JOSEPH FLORY, Suing as Members of the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Now comes the said Missouri, Kansas & Texas Railway
28 Company and shows to the court that within due time after the commencement of this suit it filed a proper petition and

bond for the removal of this cause to the United States court for the district of Missouri in which Cooper county is situated, for the reason that the said suit involved an amount in excess of two thousand dollars, exclusive of interest and costs, and that at the time of the commencement of said suit the plaintiffs were residents and citizens of the State of Missouri and the defendant a citizen of the State of Kansas, where it is incorporated, which diverse citizenship has been continued.

That this court refused to make an order removing said cause, but notwithstanding the defendant, as was its right and duty, caused a complete transcript of all the pleadings, petitions, and bonds in said cause to be filed in the office of the clerk of the United States circuit court for the central division of the western district of Missouri, at Jefferson City, Missouri, within the time required by law, and that said cause has been pending in said United States court ever since.

That from term to term of said court the said case has been continued at the request and for the accommodation of the plaintiffs.

That this defendant did not know that the said cause was continued on the docket of this court after the filing of the transcript aforesaid in the United States court, and had no notice or intimation that the case was set on the docket for trial at any time thereafter, and especially on December 2d, 1897, except from an incidental remark in a letter received from Mr. W. M. Williams, of Boonville, which was written in relation to other cases, and in which he said he knew nothing about this case, and that the defendant's attorney would have to see the attorney general of the State in regard to trying the case on December 2d, as was being arranged in regard to the other cases written about. This letter was re-
29 ceived in St. Louis on November 30th by the defendant's attorney, who had not enquired about said cause, and who did not then understand that there was any intention to insist upon a trial of the case in this court, and regarded the matter contained in said letter as a casual remark of Mr. Williams, and although said letter contained the farther statement that he (Mr. Williams) understood that the attorney general would be in Boonville on December 3d, still the defendant's attorney did not construe that as meaning that there would be any effort to try the case at that time or on December 2d, on which day it now transpires the case is docketed, or that there was any claim that this court had jurisdiction to try it.

The defendant states that no pleadings have been filed in this court by defendant because of the pendency of the case in the Federal court, and that no issues have been made up in this court.

Defendant further protests that it would be unreasonable and unjust to attempt to try the case at this time or to take a default therein, without the issues having been made up, or to require the defendant to plead under the circumstances at this time, since it has not received any reasonable notice that the plaintiffs intended to aban-

don the case in the United States court, or to refuse to appear therein, or to insist upon the right to try the case in this court.

And the defendant further protests and says that the petition filed by the plaintiff does not state facts sufficient to constitute a cause of action against the defendant, and that the plaintiffs, in the preliminary steps which they took in order to lay a foundation for the commencement of this suit by them, acted in disregard of the laws of the State of Missouri and in an arbitrary and illegal manner; and, without waiving its objection to the jurisdiction of this court, the defendant now objects to the introduction of any evidence under the petition for that reason.

Without waiving its objection to the jurisdiction of this court to proceed in this case, the defendant says that it is
30 entitled to have sufficient time in which to make the necessary preparation to make a proper presentation of the matter to the court, and to establish that this court has no jurisdiction to proceed in this cause or to entertain jurisdiction over the same, or if the court shall hold that it has such jurisdiction, then to enable the defendant to determine what course it will pursue, and whether or not it will submit to the jurisdiction of the court, or whether it will take part in the proceedings in the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding, and to the end that the defendant may make such preparation and have a reasonable time in which to determine what course it will pursue, it now respectfully asks that the court suspend any farther action in this cause until the next term of court, and as a farther reason for such request the defendant states that its attorney, who has had charge of said case, and is expected to give it whatever attention may be necessary, is compelled to leave the city of Boonville on the night of December 2d in order to proceed at once to the city of Washington to give necessary attention to a case pending in the Supreme Court of the United States and liable to be called on December 6th or any day thereafter, and said attorney now leaves this protest and request to be filed in court on December 3d, having prepared the same as soon as he learned that there was a serious intention on the part of the plaintiffs to attempt to force a trial in this case.

In filing this paper or in any suggestion or in making any objection or in any action hereafter, the defendant is not to be understood as in any manner or to any extent waiving its objection to the jurisdiction of this court in this case, nor as abandoning its claim that the case is now pending in the United States court aforesaid.

GEO. P. B. JACKSON,
Attorney for Defendant.

31 Which protest was by the court overruled, denied, and disregarded, and the trial of the case ordered to proceed.

To which action of the court the defendant at the time duly excepted.

Thereupon the case was taken up for trial, and the defendant de-

clined to take part therein; and the plaintiffs, to sustain the issues upon their part, offered evidence as follows, to wit:

J. F. GMELICH, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Mr. PENDLETON: I was requested by Mr. Jackson not to make any objection without saving the objection to the jurisdiction of the court, and, saving that objection as made in the protest filed, we renew the objection for the farther reason the petition does not state facts sufficient to constitute a cause of action, and we object to any trial being had for the reason the defendant has no answer filed. I would like to have the pleadings filed and the issue made.

Which objections were by the court overruled.

To which action of the court in overruling said objections and each of them the defendant duly excepted at the time.

Mr. CROW: Mr. Gmelich, please state your name and residence.

A. My name is James F. Gmelich; Boonville, Missouri.

Q. I will commence rather in the middle of this proceeding on account of some papers that Gen. Harding has gone after. You are acquainted with the location of the M., K. & T. Railway Company's track that runs through your city?

A. Yes, sir.

Q. And the operation of the trains thereon?

A. Yes, sir.

Q. You are acquainted with the location of the bridge
32 here at Boonville?

A. Yes, sir.

Q. I will get you to state if you have any knowledge of the custom of the M., K. & T. Railway Company as to the charges between this point and points between here and Moberly on their lines, with reference to the amount—whether it is in excess of three cents a mile.

A. Yes, sir; I know it is. I have traveled that way frequently, and there is an additional charge. In addition to the mileage, there is a charge of twenty-five cents toll for crossing that bridge.

Q. Well, for what?

A. Simply—I don't know——

Q. How? Twenty-five cents the whole train or each passenger?

A. Each passenger pays twenty-five cents toll each way.

Q. You have paid that toll yourself?

A. Yes, sir; I have.

Q. How recently?

A. Well, I have paid it frequently.

Q. Well, within the last twelve months?

A. Well, within the last twelve months I couldn't say, because a short time ago a party of us went down to Jefferson City and we got round-trip tickets. They make a reduction on round-trip tickets.

Q. I will get you to state, Mr. Gmelich, whether or not you are acquainted with the custom of the road with reference to charges from points beyond Moberly—with reference to charges from this town to points beyond Moberly.

A. I think when they are competing with other lines, why, it seems that they knock that out or do something.

Q. You know nothing about the organization of the officers of the company? Do you know whether the bridge company keeps an office in this city?

A. I don't think they do.

Q. You have lived here a great many years?

A. I have lived here a great many years.

Q. You are familiar with all the business people of the city?

A. Yes, sir.

Q. If they had an office here would you be likely to know
33 it?

A. I think I would. I have never heard of any.

Q. Do you know who has charge of the bridge here?

A. I don't know positively; this man down there, George Jacobs, tends to opening the bridge in the summer time—watchman or whatever they may be.

Q. Do you know whether or not the agent of the M., K. & T. R'y Co. has any direction or control over the bridge?

A. I don't know whether he does or not.

Q. Do you know whether the bridge is used for wagon purposes?

A. It is not used for that purpose at all.

Q. Was it ever?

A. No, sir.

Q. Is it for foot passengers?

A. No, sir.

Q. As to freight traffic, do you know anything about that?

A. I don't know anything about that because I am not acquainted with it.

Q. You ship goods here frequently?

A. Yes, sir; I did.

Q. Was there ever any toll charges then?

A. I don't know. I have always been a small shipper; more by express than anything else.

(Witness excused.)

FRED SAUTER, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. You are a resident of Boonville?

A. Yes, sir.

Q. How long have you lived here?

A. I have lived here 27 years.

Q. You are in the mercantile business here?
A. Yes, sir.
Q. Engaged in buying and selling merchandise and shipping?
A. Yes, sir.
Q. You are acquainted with the M., K. & T. Railway Company's tracks in your city?
A. Yes, sir.
Q. Acquainted with the location of this bridge?
A. Yes, sir.

34 Q. Do you know whether or not the M., K. & T. Railway Company has control of the bridge?

A. I am not sure, but it seems so.
Q. Do you know whether or not the bridge company as a corporation has an office in this city?
A. I never heard of any.
Q. You lived here when this bridge was erected?
A. Yes, sir.
Q. And you say that to your knowledge that corporation never maintained an office here?
A. I never heard of any.
Q. Well, who has had charge during all these years of this bridge?
A. Well, I think the M., K. & T. Railway Company.
Q. Well, has any one located here, representing either the railroad company or the bridge company, had control or the management and operation of the bridge to your knowledge?
A. I don't know any particular one, but it seems, my impression is, it is under the control of the M., K. & T. road. I may be mistaken. I don't know.
Q. I will get you to state if you know anything about the M., K. & T. Railway Company charging a toll of twenty-five cents for passengers to points between here and Moberly on the road.
A. Yes, sir; I had occasion to go to Fayette twice last month.
Q. What is the distance from here to Fayette by rail?
A. I think it is fifteen miles; isn't it? It may be only twelve miles. I don't know exactly what it is.
Q. How much fare did you pay?
A. Sixty-five cents.
Q. Well, if it was fifteen miles, that would be forty-five cents?
A. I guess it is twelve miles.
Q. You purchased a ticket?
A. Yes, sir.
Q. Where did you purchase it?
A. Here at the depot.
Q. Where?
A. At the M., K. & T. depot.
Q. Of their agent in charge of their station?
A. Yes, sir; Mr. Boyd.

35 Q. On that ticket was there anything that called for twenty-five cents for toll on the bridge?

A. I don't think there was; it just said Fayette. I never noticed anything.

Q. Well, you have been buying tickets and going over there for years?

A. Well, I haven't been going——

Q. I mean across the river?

A. Yes, sir.

Q. Did you ever notice anything on any of their tickets that called for toll for the bridge?

A. I don't remember. I don't think it did.

Q. You never received a separate ticket?

A. No, sir.

Q. And you say you paid that rate, twenty-five cents per passage, twice last month?

A. Yes, sir; for November.

Q. November, 1897?

A. Yes, sir; and October.

Q. Do you know anything about whether there is any extra charges over the bridge for freight?

A. I couldn't say that.

Q. You never examined your waybills?

A. No.

Q. Now, do you know as to whether or not they charge toll for business from here to St. Louis?

A. I think not, because the rates over the Missouri Pacific or the M., K. & T. are just the same; so there couldn't be any charges.

Q. Do you know whether or not they charge this toll at points, say, from Moberly to Fayette westward to Sedalia and points beyond?

A. Where there is no competing lines.

The COURT: Do you know of any particular individual case? If so, state that. Do you know what the rate from Sedalia to Moberly is?

A. No; I do not.

Mr. CROW: Do you know the distance from Moberly to Sedalia?

A. I can't say that, either.

Q. Have you ever had occasion to go over to the junction over here?

A. No; I never went to the junction.

(Witness excused.)

C. C. BELL, being duly sworn in behalf of the plaintiffs, testified as follows:

36 Direct examination by Mr. CROW:

Q. Mr. Bell, how long have you resided in Boonville?

A. Off and on since '54.

Q. Well, you were here then, a resident of this city, when the bridge was erected?

A. No, sir; not during those years. I was a resident of Texas then.

Q. Well, do you know of any one now or in the past that has been located here in your town that has maintained an office for the bridge company in this city?

A. I do not.

Q. Have they none here now?

A. Not that I know of.

Q Are you acquainted with the custom of this railroad company, the M., K. & T., as to charging toll for travel between Boonville and points beyond the river?

A. You mean for passenger traffic?

Q. Yes, sir; for passenger traffic.

A. I know there is an extra charge made for crossing the river. At least it seems to be when you compute the distance.

Q. Have you ever had occasion to ride across there and notice that charge yourself?

A. Yes, sir.

Q. What points?

A. Different points.

Q. Did you ever ride over to the junction?

A. Yes, sir.

Q. What charge do they make for going over there?

A. They take out ten miles of mileage for the bridge.

Q. That is, when you have a mileage book?

A. Yes, sir.

Q. That is equal to twenty-five cents?

A. Yes, sir.

Q. You pay twenty-five dollars for a thousand-mile ticket?

A. That is right.

Q. No-, how far is it to the junction?

A. It is less than three miles.

Q. And how much do they tear out of your mileage book when you go to the junction?

A. It is equal to about twelve or thirteen miles.

Q. Taking ten miles out for the bridge?

A. I think so.

37 Q. Did you ever have occasion to buy a ticket across there?

A. Yes, sir; I have.

Q. To the junction?

A. Yes, sir.

Q. What did they charge you?

A. I think it is thirty-five cents.

Q. Do you know whether the freight traffic—as to whether or not there is any charge for toll there?

A. Well, how do you mean?

Q. Well, I mean any bridge traffic in addition to the railroad traffic.

A. I have no experience in shipping local freight. In shipping through freight I have noticed that in long distances there is not.

The COURT: There is no bridge toll on freight for long distances?

A. Long distances and competing points there is not.

Q. How about passenger tariff for points, say Moberly and on to St. Louis, is there any bridge toll there?

A. I suppose St. Louis being a competing point, I suppose it is the same as the Missouri Pacific, and in fact I know it is.

Q. You have ridden over both roads and paid the same fare?

A. Yes, sir.

Q. Do you know how much mileage they tear out from here to St. Louis?

A. One hundred and eighty something; I disremember the exact amount.

Mr. CROW: I believe you stated you didn't know the exact distance from here to Franklin junction?

A. I think it is something less than three miles.

Q. Well, you know it is less than three miles, don't you?

A. Yes, sir; something less than three miles.

Q. Have you ever had occasion to go to Kingsbury?

A. Yes, sir; I did.

Q. Do you know how far that is?

A. It is just across the river; possibly a mile.

Q. About a mile, isn't it?

A. Yes, sir.

38 Q. From the station? Well, what did they charge you there?

A. I don't remember, but I think it is possibly the same as the bridge.

Q. Twenty-five cents?

A. Yes, sir; I think—I don't remember that. It has been some time since I bought a ticket to Kingsbury.

(Witness excused.)

J. H. BROKMEYER, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. How long have you lived here, Mr. Brokmeyer?

A. About 27 years.

Q. Have you had occasion to ride over this M., K. & T. railroad from Boonville?

A. Yes, sir.

Q. To what points have you ridden in the last twelve months on that line?

A. I generally go to St. Louis.

Q. Do you know anything about the charging of twenty-five cents for tariff on the bridge on each passenger that goes over?

A. No; I don't.

A. You don't know anything about that?

A. I know I have come home on a ticket to the junction one time and they said I would have to pay thirty-five cents more.

Q. Do you know how far it is to the junction?

A. Well, I don't know; that was about three miles.

Q. Well, did you pay it?
A. O, yes.
Q. When was that?
A. That was six months ago.

(Witness excused.)

JAMES HARDING, being duly sworn on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. What official position do you occupy?
39 A. I am secretary of the board of railroad and warehouse commissioners.
Q. How long have you been secretary?
A. Nearly nine years.
Q. Nearly nine years?
A. Yes, sir.
Q. What position did you occupy before that?
A. I was a member of the railroad commission.
Q. For how long?
Q. For twelve years.
Q. For twelve years, then, you have been in the services of the railway commission office in this State—twenty-one years?
A. Twenty-one years next January.
Q. You are familiar with the property of the M., K. & T. through the city of Boonville?
A. Yes, sir.
Q. You are familiar with this bridge over the Missouri river?
A. Yes, sir.
Q. I will get you to state if in your official capacity you have ever had occasion to investigate the relation between the M., K & T. Railway Company and the bridge company.
A. Never, excepting as the matters came up in the investigation of charges.
Q. Well, you were present when that investigation was conducted?
A. Yes, sir.
Q. I will get you to state if you know from your own knowledge, not as a matter of record, but as your own knowledge, as to whether or not they are a separate corporation.
A. There is but one corporation makes report to the railroad commission.
Q. But one corporation makes report to the railroad commission?
A. There is no report made for the Boonville Bridge Association.
Q. Are you familiar with the distance on this road from here to Fayette and from here to Franklin junction?
A. Well, on the railroad schedule it is two miles; to Fayette it is twelve miles.

Q. Have you got anything in that book there that will show the distances?

A. I don't think so. The mileage table doesn't show any
40 distances, but I have as from their distance table the distance to the junction is two miles; Fayette, twelve miles.

Q. Do you know anything about the charges that they make?

A. I know nothing excepting so far as shown by their tariffs.

Q. What do those tariffs show? You have got a copy of them there, have you?

A. They are referred to here in this (meaning a book).

Q. That tariff sheet you have in the book is the report they made themselves?

A. Yes, sir. The statement here made in the report of the official proceedings, in the hearing referred to, is as follows: Freight charges referred to are stated as follows under the head of special instructions, page 4, M., K. & T., local distance tariff number 300, effective July 14, 1893: Boonville bridge toll.—On all freight moving under this tariff and passing over the Boonville bridge the following arbitraries will be added to distance tariff rates to cover Boonville bridge toll: All L. C. L. freight, 5c. over 100 pounds; all C. L. freight, 2c. over 100 pounds, at minimum weight, 20,000 pounds. That special instruction is carried on all local distance tariffs up to date.

Q. That report there is under their signature?

A. Yes, sir.

Q. Now, do they make any report as to passenger tariffs?

A. No, sir. Their tariff is fixed by law.

Q. They are not required to make any report as to passenger tariff?

A. No, sir. That is understood to be three cents a mile.

Q. Have you got with you a certified copy of the proceedings of the railroad and warehouse commissioners in the investigation?

A. I have not the original.

Q. A certified copy?

A. Yes, sir. It is in this report.

Q. Properly certified to there and printed there, is it? Just examine it and see if it is.

A. Yes, sir.

Mr. CROW: The statute in this proceeding provides that
41 the certified copy of the commission's report shall be evidence. We have it certified there in a book. That is a copy certified to by Gen. Harding himself. If your honor prefers we can furnish a typewritten copy.

The COURT: Just use your own pleasure.

Mr. CROW: I introduce that printed copy. Just consider that in. Said offer is marked "Exhibit A."

Mr. CROW: Gen. Harding, do you know whether or not the charter of the Boonville bridge requires that an office of that bridge be kept here in this city?

A. I never saw the charter.

Q. You never had occasion to investigate it?
A. No, sir.

Mr. CROW: At this point I want to ask leave to introduce a certified copy of the charter of the Boonville bridge, to show that they are required to keep an office here.

Said offer is in words and figures as follows, to wit:

STATE OF MISSOURI, *ss:*

I, Alexander A. Lesueur, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of association of the Boonville Railroad Bridge Company, filed December 19th, 1870, as the same appears on file and of record in this office.

In testimony whereof I hereunto set my hand and affix the great seal of the State of Missouri. Done at office, in the city of Jefferson, this 13th day of January, 1898.

[GREAT SEAL.] A. A. LESUEUR,
Secretary of State.

UNITED STATES OF AMERICA.

STATE OF MISSOURI, } *ss:*
County of Cooper, }

Boonville Railroad Bridge Company.

Articles of Association and Agreement.

42 For the purpose of organizing a company to construct, maintain, and operate a toll-bridge over and across the Missouri river from a point in or near the city of Boonville, in the county and State aforesaid, to a point in or near the town of Franklin, in the county of Howard, in same State, for public use for the crossings of persons and property by both railroads and ordinary road travel, in accordance with the laws of the State of Missouri (see chapter 37, article 7, of the statute laws of said State), do enter into the following articles of association:

1st. The name and title of this association shall be "The Boonville Railroad Bridge Company."

2d. This company shall continue for one hundred years from the day these articles of association shall be filed with the secretary of state for the State of Missouri.

3d. The said bridge shall be constructed from a place in or near the city of Boonville, in the county of Cooper, across the Missouri river to a place in or near the town of Franklin, in the same State.

4th. The said bridge is to be a public toll one for crossing persons and property and to be used for both railroad and ordinary road travel at reasonable rates.

5th. The capital stock of this company shall be one million dollars, divided into shares of one hundred dollars each.

6th. The names and places of residence of the original directors

of this company who shall manage its affairs for the first year and until others are chosen in their places are:

Names.	Residence.
J. I. Stephens	Boonville, Missouri.
James M. Nelson	" "
H. Bunce	" "
John L. O'Bryan	" "
J. C. McFadden	" "
C. W. Sombart	" "
Wm. H. Trigg	" "
James H. Walker	Bunceton, Missouri.
N. G. Elliott	Howard county, Missouri.
S. T. Hughs	" "
A. Jaynes	Sedalia, Missouri.
John R. Barrett	" "
John F. Phillips	" "

7th. By-laws for the government of said company, not inconsistent with the laws of Missouri or these articles of association, shall be adopted.

Names of subscribers.	Places of residence.	No. of shares.
John L. O'Bryan	Boonville, Mo	Ten.
H. Bunce	Boonville, Mo	Ten.
Leslie Smith	Boonville, Mo	Ten.
J. L. Stephens	Boonville, "	Ten.
J. L. Birch	New York	Ten.
James M. Nelson	Boonville	Ten.
N. G. Elliott	New Franklin	Ten.
Milo Blair	Boonville	Ten.
D. Andrew	Boonville	Ten.
James H. Walker	Bunceton	Ten.
G. Heim	Boonville	Ten.
John H. Stephens	Bunceton	Ten.
J. R. Estill	Howard Co	Ten.
I. T. McFadden	Boonville	Ten.
Walz & Brenneisen	Boonville	Ten.
Wm. Harley	Boonville	Ten.
M. J. Wertheimer	Boonville	Ten.
Henry McPherson	Boonville	Ten.
S. T. Hughes	Howard	Ten.
Wm. H. Trigg	Boonville	Ten.
C. W. Sombart	Boonville	Ten.
Julius Sombart	Boonville	Ten.
A. A. Jaynes	Sedalia, Mo	Ten.
44 J. R. Barrett	Sedalia, Mo	Ten.
C. Newkirk	Sedalia, Mo	Ten.
Jno. F. Phillips	Sedalia, Mo	Ten.

Filed December 19, 1870.

FRANCIS RODMAN, *S'y of State.*

Q. I will get you to state whether or not the Boonville Bridge Company has ever maintained an office in this city.

A. Not to my knowledge.

Q. Now, do you know whether or not the Boonville Bridge Company and the M., K. & T. Railway Company, whether or not the securities of those two companies are maintained separately now?

A. I think not, sir.

Q. Well, do you know who owns the stock of the Boonville Bridge Company at this time?

A. I think very much the greater portion of it is owned by the Missouri, Kansas & Texas R'y Co.

Q. That is the company that operates this line of roads across the bridge?

A. Yes, sir.

Q. Do you know what proportion of it they own?

A. No, sir.

Q. Well, you have got it in that book there, haven't you?

A. In the report they make, the list in the report to the company—commission, I should say. It is in the report that is made by the company to the railroad commission.

Q. Well, have you got that?

A. No, sir.

Q. Haven't you got that statement there, that report?

A. It may be in the evidence here. It is made in the statement of Mr. Jackson to the commissioners.

Mr. CROW: I want to ask leave of the court to introduce a certified copy of the articles of incorporation of the M., K. & T. Railway Company as filed in the office of the secretary of state—not for the purpose of proving that they are a corporation, but for another purpose.

Said offer is in words and figures as follows:

45 STATE OF KANSAS, }
Office of the Secretary of State. }

I, W. E. Bush, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original articles of incorporation of the Missouri, Kansas and Texas Railroad Company as filed in my office on the 30th day of December, 1869.

In testimony whereof I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 17th day of January, 1898.

[L. S.]

W. E. BUSH,
Secretary of State.

Articles of Incorporation of the Missouri, Kansas and Texas Railroad Company.

STATE OF KANSAS, } ss:
County of Bourbon, }

We, the undersigned, hereby certify that in accordance with the provisions of chapter No. 23, Laws of Kansas, A. D. 1868, page No. 190, we have associated ourselves together as a joint stock company under the name and title of the Missouri, Kansas and Texas Railroad Company.

The purposes for which said company is formed is the construction and operating of a railroad from a point on the State line of Kansas and Missouri where the Fort Scott branch of the Tebo and Neosho railroad of Missouri intersects the same, in a westerly or southwesterly direction through the city of Fort Scott to a point on the southern or western boundary of the State of Kansas, near the southwest corner thereof, through the counties of Bourbon, Allen, Neosho, Woodson, Wilson, Greenwood, Howard, Cowley, Sumner, Harper, Barber, Comanche, and Clark, an estimated distance of three hundred and fifty (350) miles.

46 The principal office of said company shall be in the city of Fort Scott, State of Kansas, until otherwise ordered.

The term for which said company shall exist shall be ninety-nine (99) years.

The number of directors shall be five (5), and George A. Crawford, H. T. Wilson, and J. R. Morley, of Fort Scott, State of Kansas, and A. C. Marvin and Cyrus Newkirk, of Sedalia, State of Missouri, shall be the directors for the first year.

The amount of the capital stock of said company shall be five million (5,000,000) dollars, divided into fifty thousand shares of one hundred dollars each.

Witness our hands this twenty-third day of December, A. D. 1869.

GEORGE A. CRAWFORD.
HIERO T. WILSON.
J. R. MORLEY.
ASA C. MARVIN.
CYRUS NEWKIRK.

STATE OF KANSAS, } ss:
County of Bourbon, }

Personally before the undersigned, a notary public in and for the county of Bourbon and State of Kansas, came George A. Crawford, H. T. Wilson, and John R. Morley, to me personally known to be the identical persons whose names are affixed to the foregoing certificate and who are citizens of the State of Kansas, and acknowledge the making and signing of the same to be their voluntary act and deed for the purposes therein stated.

In testimony whereof I have hereunto subscribed my name and affixed my official seal this 23d day of December, A. D. 1869.

[SEAL.] P. H. TIERMAN,
Notary Public.

STATE OF MISSOURI, } ss:
County of Pettis, }

Personally before the undersigned, a notary public in and
47 for the county of Pettis and State of Missouri, came A. C. Marvin and Cyrus Newkirk, to me personally known to be the identical persons whose names are affixed to the foregoing certificate, and acknowledged the making and signing of the same to be their voluntary act and deed for the purposes therein stated.

In testimony whereof I have hereunto subscribed my name and affixed my official seal this 24th day of December, A. D. 1869.

[SEAL.] J. F. TOBIAS,
Notary Public.

WITNESS: Here is a statement of the stock list of the Boonville Railroad Bridge Company which was introduced as evidence by Mr. Jackson, the attorney of the Missouri, Kansas and Texas Railway Company, at the hearing of the cause. The stock list shows ten thousand shares.

Q. Well, you heard that statement made?

A. Yes, sir.

Q. Wait a minute. Without that memorandum in front of you, can you testify, of your own knowledge, as to the statement made by Mr. Jackson?

A. I can testify this is a correct copy of the list which he handed in himself.

Q. That was a memorandum furnished by him?

A. Yes, sir.

Q. As representing which?

A. The Missouri, Kansas & Texas Railway Company.

Q. Was that at the hearing?

A. Yes, sir.

Q. That is a part of the report, then?

A. Yes, sir.

Q. Looking at your report there, can you tell how much stock is owned by the M., K. & T. Railway Company?

A. At that time—June 6th, 1895—the Missouri, Kansas & Texas railway owned 9,893 shares out of 10,000.

Q. Who owned the other seven?

A.—

P. E. Fairbanks	1	share.
John Montgomery, Jr	5	"
48 Geo. P. B. Jackson	5	"
H. C. Rouse	10	"
Colgate Hoyt	5	"
Wm Dowd	5	"
Joel Freeman	5	"
Wm. Bond	5	"
Simon Sterne	5	"
Henry W. Poor	5	"
Thos. C. Purdy	5	"

Geo. J. Pollock	5 "
J. Hagerman	1 share.
J. H. Bond	2 shares.
Wm. O'Connell	5 "
C. G. Hedge	5 "
R. W. Maguire	2 "
N. G. Elliott	10 "
John S. Elliott	1 share.
John Cosgrove	1 "
Speed Stephens	9 shares.
H. Bunce	10 "

Q. Now, General, does that report there show how those shares are held—whether they are held in trust or not?

A. No, sir; I don't think it does.

Q. Well, do you know whether or not those shares were held in trust?

A. I don't; I think the bonds at one time were held in trust.

Q. Well, they were held by the trust company?

A. Yes; by the trust company, and I did know about the status of the bonds.

Q. Now, Gen. Harding, do you know the amount of the bonded indebtedness of the bridge?

A. I don't remember; no, sir.

Q. Well, do you know who takes care of those securities—keeps up the interest on the bonded debt?

A. The Missouri, Kansas & Texas Railway Company.

Q. Do you know who the officers of the bridge company are?

A. No, sir.

49 Q. You don't know whether they are stockholders in the M., K. & T. or not?

A. No, sir.

Q. You never had occasion to investigate that part of it?

A. No, sir. A copy of the list is in that report.

Q. You don't know anything about the freight at all except the tariff? You don't know anything except what the tariff shows?

A. No, sir; I know that is the regulation printed on their tariff sheets.

Q. Now, after the railway and warehouse commissioners had made the order set out in this report, I will get you to state whether or not the M., K. & T. Railway Company ever complied with that order.

A. They have not.

Q. They have ignored it, have they?

A. Yes, sir.

Q. And are still doing so?

A. Yes, sir.

Q. And by reason of their ignoring it these proceedings were instituted in behalf of the railway and warehouse commissioners?

A. Yes, sir.

(Witness excused.)

C. C. BELL, being recalled in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. Mr. Bell, I will get you to state if you have ever had occasion to ship any freight locally from this point to points on the other side of the river.

A. I have; yes, sir; in car-load lots.

Q. At what time were those shipments made?

A. Well, during the last ten years; made some during the last six or eight weeks or two months.

Q. Now, I will get you to state, if you know, whether or not in addition to the regular tariff schedule of freight anything was added by the M., K. & T. Railway Company for toll.

A. We understood that on all local shipments, near-by shipments, there is a bridge toll.

Q. To what particular points have you made shipments lately?

50

A. Rocheport, New Franklin, Higbee.

Q. Taking the shipment to New Franklin, how much bridge toll did you pay per car on that?

A. A car-load of empty barrels, for instance, is nine dollars and something, some odd cents—about nine dollars—four dollars of which is bridge toll.

Q. Well, now, take down to Rocheport; what is the tariff there?

A. I think eleven dollars and something.

Q. How much?

A. I believe it was eleven dollars, the regular tariff rate. I am quoting rate on empty barrels on car-load lots.

Q. Four dollars of that is represented as bridge toll?

A. Yes, sir; that is our understanding. Whenever it is $24 this charge is $5, but $20 or less $4 represents the toll. This only applies to local shipments.

Q. You have occasion to ship freight locally very frequently?

A. Yes, sir.

Q. And have shipped and paid that tariff recently?

A. Sometimes the road will take it off where they get all the freight from the other end; sometimes, carrying freight through, they remit what is know- as the bridge toll.

Q. The charge is not uniform to all parties?

A. I suppose that is uniform to everybody.

Q. For instance, if you ship the barrels down there and didn't bring the barrels back you would have to pay bridge toll, but if you ship them back it would leave bridge toll for one way?

A. I am not prepared to say why that is done.

Q. Is that the fact?

A. Yes, sir.

Q. Then under these conditions the shipment to the same point is a different price?

A. Well, to be plain about this, I want to be understood when I say that our rates to these points says four dollars for seven thou-

sand pounds, which means a car-load of empty barrels. There is four dollars added to the bridge to any local point. Now, in
51 shipping through to distant points there is no extra charge made for the bridge, because then it is so much a hundred.

Q. I understood from your testimony and the other gentlemen here that this passenger and freight tariff operates simply as local charges from and to this town and other points near by on the road?

A. Yes, sir; locally. I don't think that that is added into passenger travel for long distances to competing points, but in local points it is.

(Witness excused.)

J. H. BROKMEYER, being recalled in behalf of plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. Have you had occasion to ship any freight locally from Boonville to any point locally beyond the river?

A. Oh, yes, sir; I have had some occasion.

Q. Just designate to what particular point you shipped there and what particular class of freight.

A. For instance, whenever I want to ship a car-load of oats to Estill.

Q. Where is Estill?

A. About seven or eight or ten miles from here.

Q. The other side of the river?

A. Yes, sir.

Q. Was there any tariff or toll charged for the bridge?

A. Whenever there is a car-load they said to me that it is five dollars additional charge for the bridge.

Q. You paid it?

A. Yes, sir.

Q. How recently have you paid that?

A. That is a good while ago.

Q. Do you know whether they still charge that?

A. I believe they still have it the same way. I know I had to pay $17 for the car-load, and I believe the rate was the same as the other.

Q. Well, it is the same coming this way on local freight?

A. Yes, sir.

52 Q. It *is* five dollars additional charge?

A. That is my understanding about it.

(Witness excused.)

H. F. SANDERS, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. How long have you lived in Boonville?

A. About 12 or 15 years.

Q. Well, you are engaged in what business here?
A. Feed, fuel, and handle oil.
Q. Do you have occasion to ship a great deal of stuff over the M., K. & T. road?
A. Yes, sir.
Q. I will get you to state if you know whether there is a bridge toll on freight aside from the regular freight tariff.
A. Yes, sir.
Q. Do you know what it is per car on different classes of articles?
A. No, sir; I don't know exactly.
Q. Well, do you know on any particular article what it is?
A. No, sir; I don't remember exactly what it is now. I have tried to ship feed from over there several times and never could ship it on account of the bridge toll.
Q. Why?
A. It would cost too much. The bridge toll added to the freight would cost too much.
Q. As a matter of fact you never paid that toll?
A. No, sir; I never could pay it on account of the toll.
Q. You ship a great deal of stuff from here to Higbee?
A. Yes, sir.
Q. Do you know the number of miles from here to Higbee?
A. No, sir.
Q. Do you know the number of miles from here to any given point from which you ship to this town?
A. Well, no, sir. I ship from Moberly, Hannibal, and Higbee.
53 Q. Do you know what the distance is from here to Moberly?
A. About forty miles, I think.
Q. Do you know what the freight charges is per hundred pounds?
A. The way I get freight there is generally through freight.
Q. Is there any bridge toll on freight coming from Moberly here?
A. That I couldn't say.
Q. What rate do you pay?
A. That I couldn't say.
Q. What is the rate from here to Higbee on meal?
A. Forty cents a ton.
Q. That is from Higbee here?
A. Yes, sir.
Q. You pay forty cents a ton?
A. Yes, sir.
Q. How many tons on a car?
A. From twenty to thirty tons a car-load.
Q. That is, from Higbee here?
A. Yes, sir.
Q. You have the waybills showing that, have you?
A. Yes, sir.

(Witness excused.)

F. T. WALZ, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. Are you in the employ of the M., K. & T. railroad?
A. Yes, sir.
Q. In what capacity?
A. As agent now at the M., K. & T.
Q. In charge of the station here?
A. Yes, sir.
Q. Have you the tariff sheet of freight and passenger rates at this point to other points?
A. I have the two local tariffs. I was asked to bring the other tariff, but I couldn't very well get at that—couldn't very well tell what ones you wanted. Here is the two local tariffs.
Q. Will you please take them and turn to local tariff and tell what the rate is on meal in car-load lots from here to Higbee
54 or Higbee here? The rate would be the same both ways, wouldn't it?
A. Yes, sir; the freight would be the same either way. This tariff don't cover that. It covers it in car-loads, but not in use now. The local tariff is not here. However, here is sand, brick, and cord wood. The rate would be eight dollars.
Q. What would be the bridge charge?
A. It would be according to the weight.
Q. How much per hundred or ton?
A. Two cents per hundred.
Q. That would be two dollars per ton?
A. Yes, sir.
The COURT: It would be four dollars a ton, wouldn't it?
A. Yes, sir.
Mr. CROW: That would be on that class of articles?
A. Yes, sir.
Q. Coal, sand, brick, and cord wood?
A. Yes, sir.
Q. I understood you to say from Higbee to this point the charge on the waybill would be four dollars in excess of the statutory tariff rate for that class of freight?
A. No, sir; it would be four dollars. I mean four dollars per ton.
The COURT: Well, two cents per hundred.
Mr. CROW: Well, two cents a hundred in excess of the statutory tariff?
A. Yes, sir.
Q. Now, to what points on the line, from Boonville, out of Boonville, does the tariff apply?
A. To all shipments.
Q. Does it apply to shipments to Chicago?
A. Well, now, I couldn't answer that question exactly.
Q. Does it apply to shipments in Missouri?
A. No, sir; I believe that is not exactly the idea. I understand

the company means to charge—the bridge is allowed two cents on all shipments. While our tariff rates — through business enumerates or names so much on certain articles, I don't understand from our tariff that the bridge charges are added to the through business.

Q. On shipments off the Burlington and consigned to the M., K. & T., and the waybill comes to you to collect, is there a
55 bridge toll added to that?

A. That would have to rest with the company whether it settled for the bridge company.

Q. You collect the money here?

A. We collect it, but certain classification is allowed so much. Whether the bridge is allowed anything on that business I am not prepared to state.

Q. You know what that rate is?

A. Yes, sir.

Q. Take a box of dry goods. Now, how much in excess of the statute rate is that?

A. That is below. It is made in competition with the other line.

Q. It is the same as the Missouri Pacific?

A. Yes, sir.

Q. Then, if there is any bridge toll, it is absorbed in the haul?

A. Yes, sir.

Q. Then on shipments to St. Louis is it the same way?

A. Yes, sir.

Q. Suppose it is on a shipment from here to, say, Cedar City; is there a bridge toll on that?

A. Cedar City?

Q. Well, it would be North Jefferson on your line.

A. I don't know just the exact mileage to that point. It would be if it was less than the St. Louis tariff; I expect it would be. We would figure, then, the mileage applies so much for the bridge to any point this side of St. Louis, but when the mileage would figure up more than the St. Louis rate the St. Louis rate would apply.

Q. What is the rate from here to Fayette on live stock?

A. It would be ten dollars, standard cars, plus——

Q. Well, that $10 is the tariff statutory rate, is it?

A. Yes; plus the bridge charge, would be $4, shipment on hogs, and $4.40 cattle, would be the regular tariff.

Q. It would be $14 in one case and $14.40 in the other?

A. The bridge charge would simply be as in the other case—2 cents a hundred.

Q. When you bill a car-load of stock out of here for Fayette does that waybill and your consignment—does that call for any bridge charge?

A. Yes, sir.

56 Q. What is it marked down, as a separate item?

A. Yes, sir.

Q. On the waybill?

A. Yes, sir.

Q. You collect that, though, not for the bridge company, but for the railroad company?

A. Well, I don't know.

Q. In other words, you don't know the bridge company in your transactions?

A. Well, I am not acquainted with the bridge company. I made no remittance to the bridge company.

Q. Your remittances and collections all go to the M., K. & T. railroad?

A. Yes, sir; that we collect.

Q. I will get you to state if you know what the tariff on live stock—hogs, cattle, or sheep—would be from your station here at Boonville to Kingsbury, at the end of the bridge over there.

A. Well, that would just be the same as Fayette. Thirteen miles is the Missouri statute rate.

Q. How far is it from your station to Kingsbury?

A. I guess it is only a couple of miles.

Q. Now, what would be the tariff without the bridge?

A. Well, the tariff would be the Missouri statute rates. If it only went one mile it would be the same as thirteen miles.

Q. You are authorized to charge the same?

A. Yes, sir.

Q. How would it be down to Franklin junction?

A. That is about three miles; would be just the same.

Q. What is your passenger fare? There is no such tariff as that in regard to passengers?

A. No, sir.

Q. You say the distance is about a mile from your station at Kingsbury?

A. A little more than a mile.

Q. Say mile and a half?

A. Yes, sir; about that.

Q. What would be the statutory charge?

A. Three cents a mile would be four cents and a half.

Q. What do you charge for a ticket?

A. Thirty cents.

Q. Twenty-five cents of that is for the bridge toll?

A. That is what we understand. Of course, I don't know.

Q. There is nothing on the ticket to indicate that there is
57 any bridge toll to charge?

A. No, sir.

Q. You sell a straight railroad ticket?

A. Yes, sir.

Q. Nobody else uses that bridge but the M., K. & T.?

A. No, sir.

Q. No foot passengers nor no teams?

A. No, sir.

Q. Who has charge of the bridge here?

A. I believe C. Randecker is the bridge watchman and the bridge superintendent.

Q. Is he superintendent or watchman?

A. I don't know just his position. He watches the bridge and crosses the bridge to see there is no foot passengers.

Q. Is he the only one?

A. No, sir; I believe he has two assistants.

Q. Who employs him?

A. I don't know.

Q. Where does he get his pay-checks?

A. From the railroad company.

Q. From the pay-car the same as you do and at the same time?

A. Yes, sir.

Q. Do you know whether or not the bridge company has any office here?

A. No, sir.

Q. You don't know anything about that. Now, points from here to Sedalia, you say, the regular passenger fare of three cents a mile is charged?

A. Yes, sir.

Q. And there is no separate account kept of this freight or passenger business as far as your office is concerned?

A. No, sir.

Q. You simply remit what you receive?

A. Yes, sir.

Q. As receipts of the M., K. & T. railroad?

A. As receipts of the M., K. & T.

Mr. CROW: In regard to those tariff sheets, I want to introduce them in evidence.

A. Well, the notice wasn't very plain so I could understand just what you wanted, and I brought these along.

Q. It is the local tariff sheets I want. Will you furnish Mr. Zollinger here with them when he calls for them or you can
58 just mail them to him?

A. Yes, sir.

Mr. CROW: The local tariff sheet is offered in evidence.

Said offer is as follows, to wit:

(Said offer is marked "Exhibit B" and is hereto attached and made a part of this bill of exceptions.)

JAMES COWGILL, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. You are one of the railroad commissioners?

A. Yes, sir.

Q. Have been for five or six years?

A. Five years.

Q. You were one of the board at the time of the investigation that has reference to this matter?

A. Yes, sir.

Q. Now, I will get you to state, if you know of your own personal knowledge, as to whether or not this M., K. & T. Railway Company

is charging twenty-five cents toll for each passenger that passes over the bridge.

A. Yes, sir; I think on the 28th of October I paid the fare.

Q. Of this year?

A. Yes, sir; of this year. The fare was $1.40. I think the distance is thirty-eight miles.

Q. Where, to Moberly?

A. Yes, sir; at three cents a mile you would have to add to the tariff twenty-five cents as bridge toll to make that much; that would make $1.39.

Q. Do you know anything about who controls the stock of the bridge company?

A. No, sir; only from the evidence developed before the hearing that we had at Jefferson City.

Q. Was that the testimony of the agents of the railroad?

A. Yes, sir.

Q. What was it?

A. They testified that the M., K. & T. Railroad Company owned all the shares except, I think, 21 shares, and that a majority of them were held in trust by the officers of the road—the majority of the 21 shares.

59 Q. Anything said about any dividends being paid on that stock?

A. Yes, sir. The question was asked, I think, Mr. Jackson, if there was any dividends paid to these 28 shareholders, and he said there had not.

Q. Have you got in your possession a copy of the list owned by the bridge company and the M., K. & T. Company?

A. I don't know whether I have or not.

(Witness excused.)

JOSEPH FLORY, being duly sworn in behalf of the plaintiff-, testified as follows:

Direct examination by Mr. CROW:

Q. What official position do you occupy?

A. State railroad commissioner.

Q. I will get you to state, if you know, whether or not the M., K. & T. Railroad Company is charging twenty-five cents per passenger bridge toll for travel from here over the M., K. & T. railroad.

A. I paid it in October—on the 28th day of October, 1897; purchased a ticket here on that date for Moberly, a distance of thirty-eight miles, and paid $1.40 for it.

Q. What would be the statutory charges at three cents a mile?

A. At three cents a mile would be $1.14.

Q. Were you present at the hearing when this matter was up before the railroad commissioners?

A. Yes, sir.

Q. Do you know what the representatives of the road said there with reference to who controlled the stock of the bridge company?

A. My recollection is that they testified—the representatives of the railroad company testified—that the M., K. & T. Railroad Company held all the shares, with the exception of 31, I understood. Judge Cowgill said 21, but my understanding is 31—$3,100.00 worth of stock.

Q. Well, do you know, as a matter of fact, whether or not the M., K. & T. Railroad Company is operating the bridge as a part of the railroad?

A. Yes, sir; I do.

60 (Witness excused.)

T. J. HENNESSEY, being duly sworn in behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CROW:

Q. What official position do you occupy?

A. Railroad commissioner.

Q. You are serving your second term now as railroad commissioner?

A. Yes, sir.

Q. You are acquainted with the facts about travel over the bridge here?

A. Yes, sir; I was on the board when this proceeding commenced.

Q. Do you know of your own knowledge whether or not they are charging that tariff?

A. Yes, sir; I went over on the same day with Judge Cowgill and Flory, and paid $1.40 fare in going over.

Q. From here to Moberly, a distance of 38 miles?

A. Yes, sir.

Q. You have known this bridge company and this bridge of the M., K. & T. for many years?

A. Yes, sir.

Q. Do you know of your own knowledge as to whether or not it has been operated by the M., K. & T. Railway Company or the bridge company?

A. No, sir; I don't. I wasn't at the other hearing, and don't know anything about it except from the record.

(Witness excused.)

Mr. CROW: That is all. Your honor, I would like the privilege of sending down those records introduced here, so when the controversy comes over the matter it will be in shape.

And this was all the testimony offered.

And thereupon the court returned its finding and judgment in favor of the plaintiffs.

And thereupon, within four days after the date of said finding and judgment, to wit, on the 6th day of December, A. D. 1897, the defendant filed its motion for a new trial in words and figures
61 as follows, to wit:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Suing as Members of the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Comes now the defendant, by its attorney, and without waiving to any extent its objection to the jurisdiction of the court to try this cause, and still insisting and protesting against such jurisdiction, moves the court to set aside its finding and judgment herein and to grant a new trial of said cause for the following reasons, to wit:

1st. It appears from the record in the case that due and lawful proceedings had been taken for the removal of the same to the United States circuit court for the central division of the western district of Missouri, and that a transcript of the proceedings therein had been filed in said last-named court, where the case is now pending.

2d. The court erred in forcing a trial of the case at the time it was so tried and in refusing to give the defendant time in which to prepare and present the facts in the case, from which it would have appeared that the transcript in the case was filed in the United States court, as aforesaid, and that said cause was continued therein from term to term at the request of the plaintiffs.

62 3d. The court erred in admitting any evidence upon the petition because the same did not state facts sufficient to constitute a cause of action.

4th. The finding and judgment of the court are wrong because it appears from the evidence in the case that the plaintiffs had not performed the acts as railroad and warehouse commissioners of the State of Missouri which were the necessary preliminary steps to the institution of a suit against the defendant.

5th. The law of the State of Missouri does not authorize the proceeding commenced by the plaintiffs.

6th. The finding and judgment are against the evidence and against the law, and are for the wrong party, being for the plaintiffs when they should be for the defendant.

GEO. P. B. JACKSON,
Attorney for Defendant.

Which said motion the court on the 20th day of May, A. D. 1898, overruled; to which ruling and order of the court the defendant, by counsel, excepted at the time.

And within four days after the date of said finding and judgment, to wit, on the 6th day of December, 1897, the defendant filed its motion in arrest of judgment in words and figures as follows, to wit:

In the Circuit Court of Cooper County, Missouri, October Term, 1897.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Suing as Members of the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

63 Now comes the defendant, by its attorney, and without waiving to any extent its objection to the jurisdiction of the court to try this case, and still insisting and protesting against such jurisdiction, moves the court to arrest the judgment herein for the following reason-, to wit:

1st. It appears from the record in the case that due and lawful proceedings had been taken for the removal of the same to the United States circuit court for the central division of the western district of Missouri, and that a transcript of the proceedings therein had been filed in said last-named court, where the case is now pending.

2d. The court erred in forcing a trial of the case at the time it was so tried and in refusing to give the defendant time in which to prepare and present the facts in the case, from which it would have appeared that the transcript in the case was filed in the United States court, as aforesaid, and that said cause was continued therein from term to term at the request of the plaintiffs.

3d. The court erred in admitting any evidence upon the petition, because the same did not state facts sufficient to constitute a cause of action.

4th. The finding and judgment of the court are wrong, because it appears from the evidence in the case that the plaintiffs had not performed the acts as railroad and warehouse commissioners of the State of Missouri which were the necessary preliminary steps to the institution of a suit against the defendant.

5th. The law of the State of Missouri does not authorize the proceeding commenced by the plaintiffs.

6th. The finding and judgment are against the evidence and against the law and are for the wrong party, being for the plaintiffs when they should be for the defendant.

GEO. P. B. JACKSON,
Att'y for Defendant.

64 Which said motion the court, on the 20th day of May, A. D. 1898, overruled; to which ruling and order of the court the defendant, by counsel, excepted at the time.

And thereupon leave was given to the defendant to file its bill of exceptions in this case on or before the 20th day of August, 1898, and the defendant now tenders this its bill of exceptions in this case, and prays that the same may be signed, sealed, filed, and made a part of the record herein, which is accordingly done on the 16th day of June, 1898.

DORSEY W. SHACKLEFORD, [SEAL.]
Judge of the Cooper Circuit Court.

The defendant duly perfected an appeal to the supreme court of Missouri.

GEO. P. B. JACKSON,
For Appellant.

65 And afterwards, to wit, on the 1st day of May, 1899, the following further proceedings were had in said cause, to wit:

H. W. HICKMAN ET AL., Resp.,
vs.
M., K. & T. R'Y CO. ET AL., App.

Come now the said parties, by attorneys, and, after argument herein, submit these causes to the court.

And afterwards, to wit, on the 30th day of June, 1899, the following further proceedings were had in said cause, viz:

H. W. HICKMAN, JAMES COWGILL, and Joseph Flory, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Respondents,
vs.
THE MISSOURI, KANSAS & TEXAS Railway Company, Appellant.
} Appeal from Cooper County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Cooper county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondents recover against the said appellant their costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in the words and figures following, viz:

66 In the Supreme Court of Missouri, April Term, 1899. Court in Banc.

H. W. HICKMAN ET AL., Respondent-,
vs.
MO., KAN. & TEX. R'Y CO., Appellant-.

Opinion.

This is an appeal by the defendant from a decree and judgment of the circuit court of Cooper county in favor of the plaintiffs.

At the time the suit was instituted the plaintiffs constituted the board of railroad and warehouse commissioners of the State of Missouri.

The petition is as follows:

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Plaintiffs state that they are the regularly elected, duly qualified, and acting railroad and warehouse commissioners of the State of Missouri, and constitute the board empowered by law to classify and regulate passenger and freight rates in the State of Missouri; that the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns an operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river, over a bridge, to the county of Howard, in the State of Missouri; that said bridge over which said railroad is con-
67 structed is a part of the roadway of the same and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs, as the board of railroad and warehouse commissioners aforesaid, that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under the authority given them as the board of railroad and warehouse commissioners aforesaid, proceeded on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law; that said defendant belongs to the class of railroad corporations designated by the laws of the State of Missouri as "class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Boonville bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents made, demanded, and received of each local passenger by said defendant is illegal, improper, and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said railroad and warehouse commissioners, the sum of five (5) cents per one hundred pounds on freights in lots of less than car-loads, and two cents per one hundred pounds on freights in car-loads; that
68 said charges so made, demanded, and received are excessive, unauthorized, and in violation of law.

That on the 22d day of July, 1895, plaintiffs, as the board of railroad and warehouse commissioners aforesaid, after having duly considered the complaints heretofore filed against the defendant, as aforesaid, found that the same were sustained by proper and sufficient evidence, and made and entered of record an order, directed to the said defendant railway company, that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Boonville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was by said plaintiffs forwarded to the general manager of said defendant's road.

Plaintiffs state that they are informed and believe the fact to be that the defendant is disregarding and ignoring said order, and is continuing, in violation of law, to charge, demand, and receive rates in excess of three cents per mile for carrying each passenger over that portion of its road which consists of said bridge, and that said defendant continues to charge, demand, and receive freight rates in excess of those authorized by law for carrying freight on that portion of its road of which said bridge over the Missouri river at Boonville constitutes a part.

Plaintiffs therefore ask that this court may issue a writ of injunction herein, or such other process, mandatory or otherwise, as may seem necessary in the premises, to restrain said defendant from further continuing to violate the law and the finding of said plaintiffs herein, acting as the board of railroad and warehouse commissioners aforesaid, that obedience to said order may be required of defendant, and that such other and further orders and decrees may be made in this cause as may seem upon a hearing to be right and proper in the premises.

R. F. WALKER,
Attorney General, for Plaintiffs.

In due time the defendant appeared and filed its petition and bond for the removal of the cause to the circuit court of the United States, the petition being as follows:

69 Your petitioner respectfully shows that it is the defendant in the above-entitled suit; that at and prior to time of the institution of this suit the defendant was, ever since has been, and now is a corporation created and existing under the laws of the State of Kansas, and that at said times and dates it was, has been, and now is a citizen of the State of Kansas and non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit at the time of the institution thereof all and each were, ever since have been, and now are citizens and residents of the State of Missouri.

That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

That the controversy in said suit is wholly between citizens of

different States, to wit, between your petitioner, a citizen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then and still are citizens of the State of Missouri, and your petitioner offers herewith a bond with good and sufficient security for its entry in the circuit court of the United States for the central division of the western district of Missouri, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this honorable court to proceed no fa-ther herein except to make an order for the removal of this case to said United States circuit court, and to accept the said surety and bond and to cause the record herein to be re-
70 moved into said circuit court of the United States in and for the central division of the western district of Missouri, and it will ever pray.

At the October term, 1895, of the circuit court of Cooper county the defendant's petition for removal was denied, and thereupon the defendant procured and filed in the United States circuit court at Jefferson City a transcript of the proceedings in the Cooper circuit court. At the January term, 1896, of the Cooper circuit court the case was continued by the court on its own motion. At the May term, 1897, of the said court the case was again continued on application of the plaintiff to the October term, 1897, of said court; at which term the case, over the protest of the defendant and its objections to the jurisdiction of said court, was taken up and tried on the evidence of the plaintiffs without any participation by the defendant in the trial, and the decree rendered as prayed for in their petition, with judgment for costs. Afterwards, in due time, the defendant filed its motion for new trial and in arrest of judgment, which being overruled, it perfected its appeal to this court.

I.

Under the laws of the United States the circuit courts thereof have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of interests, the sum or value of two thousand dollars, and in which the controversy is between citizens of different States. 25 U. S. Stats. at Large, p. 434, sec. —. Any such suit pending in a State court "may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." *Ib.*, sec. 2.

And by sec. 3 of said act it is provided that whenever any party entitled to remove any such suit "may make and file a petition in such suit in such State at the time or at any time before the
71 defendant is required by the laws of the State or the rules of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, * * * and shall make and file therewith a bond, with good and sufficient

surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall be the duty of the State court to accept said petition and bond and proceed no further in such suit." * * *

It is contended for the defendant that when the petition and bond for removal *was* filed in the case in the Cooper county circuit court, the jurisdiction of that court to take any further proceedings therein, except to make an order transferring the case to the circuit court of the United States, ceased, and that its proceedings thereafter, which culminated in the decree aforesaid, *was coram non judice* and void. Therefore the decree and judgment should be reversed.

It may be conceeded that the petition and bond for removal are in proper form, and that the petition states facts which if true are sufficient to authorize the transfer of the case to the circuit court of the United States under the statute cited, and it may be further conceded that an issue upon the facts stated in the petition could not be raised and tried in the State court for the purposes of determining the question of its jurisdiction. The State court "must take the facts to be as they are stated in the record and the petition. It has no jurisdiction to pass upon any such question. That is the exclusive province of the Federal court." Black's Dillon on Removal of Causes, § 191, and cases, note 30. The jurisdiction of the State court, however, is not ousted by the mere filing of the
72 petition and bond. "In order to warrant a removal from a court of a State into a circuit court of the United States, according to the terms of the act, the necessary diverse citizenship must exist." Powers *vs.* Chesapeake & Ohio Railway, 169 U. S., 92.

The petition when filed becomes a part of the record, and the defendant's right of removal depends upon the facts as they appear from the whole record. Stone *v.* South Carolina, 117 U. S., 431. As was said by Waite, C. J., in that case: "A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer." Yulee *v.* Vose, 99 U. S., 539, 545; Removal cases, 100 U. S., 457, 474. It is undoubtedly true, as was said in Steamship Company *v.* Tugman, 106 U. S., 118, 122, that upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the State court absolutely ceases, and that of the circuit court of the United States immediately attaches; but still, as the right of removal is statutory, before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. As was said in Insurance Company *v.* Pechner, 95 U. S., 183, 185: "His petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not in law shown to the court that it cannot 'proceed further with the

suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the
73 removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the circuit court begins.

All the issues of fact made upon the petition for removal must be tried in the circuit court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes. Removal cases, 100 U. S., 457, 472; Railroad Co. *v.* Mississippi, 102 U. S., 135, 141; Kerr *v.* Huidekoper, 103 U. S., 485; Railroad Co. *v.* Koontz, 104 U. S., 15; Chesapeake & Ohio Railroad Co. *v.* White, 111 U. S., 134, 137. If the State court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

So that the question whether a removal would be effected by the filing of the petition and bond remained to be decided by the Cooper circuit court on the face of the record as made up after the filing of the same, and unless judicially informed by the record so made that the suit was removable, it might proceed in the exercise of its jurisdiction.

The fact stated in the petition for removal that would entitle the defendant to the removal was that the plaintiffs are citizens of the State of Missouri and the defendant is a citizen of the State of Kansas. Now, while this fact is not to be disputed, but taken as true, it further appears from the record that "the controversy" inaugurated by their petition is not between them in their individual character as citizens of the State of Missouri and the defendant, but in their official character as members of "The Board of Railroad and Warehouse Commissioners of the State of Missouri." Hence, it is argued for the respondents by the attorney general that
74 the controversy is not between citizens of different States, but between the State of Missouri and a citizen of the State of Kansas, and as the statute does not authorize the removal of a suit between a State and citizens, and a State cannot be a citizen of any State, that it thus appears from the record that the case was not removable under the statute. The jurisdiction of the circuit court of Cooper county was not divested by the application for removal, and it committed no error in proceeding with the case to final judgment. This presents the crucial question on this appeal.

Is this a suit by the State of Missouri against the defendant? If so, then beyond question the case was not removable to the U. S. court, and the circuit court of Cooper county was not divested of its

jurisdiction; for it is well-settled law that "a suit instituted by a State in one of its own courts against a citizen of another State is not removable to the circuit court of the United States on the grounds of diversity of citizenship of the parties." State of Ala. *vs.* Wolfe, 18 Fed. Rep., 836; Postal Telegraph Cable Co. *v.* Alabama, 155 U. S., 482; State *v.* South Carolina, 117 U. S., 143; Germania Ins. Co. *v.* Wisconsin, 119 U. S., 473; Ames *v.* Kansas, 111 U. S., 449.

Although the State of Missouri is not a nominal party to the suit, yet if it is the real party in interest the controversy is between the State and the defendant, and the Federal statute does not apply, and the question whether the State is the actual party to the controversy must be determined by a consideration of the whole record. *In re* Ayres, 123 U. S., 443; Carson *v.* Hyatt, 118 U. S., 279; Hagard *v.* Southern, 117 U. S., 52; Maryland *v.* Baldwin, 112 U. S., 490. The law looks to "things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law." McNutt *v.* Bland, 2 How., 9.

The positive law authorizing this action is sec. 2653, R. S. 1889, the provisions of which bearing upon the present in-
75 quiry are as follows: "Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employé thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable * * * and if it be made to appear to the court on such hearing * * * that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. * * * And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers or agents, of the same, against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so

disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each
76 carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. * * * Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. * * * The costs of such proceedings may be, with the approval of the attorney general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid in the first instance out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

By section 2658 it is further provided that "to defray the necessary expenses of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the State treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the State auditor, issued upon the requisition of the railroad commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid."

The general rule is that "when the plaintiff has no real
77 interest in the subject-matter of the controversy, and can derive no advantage from the judgment; but the suit is required to be brought in his name because he holds the formal right to sue, although the action is really prosecuted for the benefit of another, the record plaintiff is only a nominal party, whose citizenship will not affect the right of removal; such right will depend upon the relative citizenship of the real party in interest."

Black's Dillon on Removal of Causes, § 86.

Under this statute the suit is brought in the name of the "Board of Railroad Commissioners," because they hold the formal right to sue, but the members of that board, neither individually nor collectively, have any interest in the subject-matter of the controversy, and can derive no advantage or benefit nor suffer any injury or loss from the judgment therein. In Ferguson *v.* Ross, 38 Fed. Rep., 161, holding that an action under the laws of New York, in the name of "the Shore Inspector," to recover a penalty for depositing pro-

hibited material in the waters of the bay and harbor of New York, which penalty, when recovered, goes into the State treasury, is in effect an action by the State, and therefore not removable under the act of Congress in question, it was said: "The nominal plaintiff here is an individual, but he sues only in his official character. The suit is brought to enforce a police regulation of the State. He has no personal interest in its subject-matter, not even for his fees or commission, for he is a salaried officer, whose compensation is secured, irrespective of the result of the suits he may bring. In the event of his removal from office the suit would be continued by his successor, not by himself. . Courts will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether a State is the real party to an action brought by or against its officer by a consideration of the whole record" (citing authorities). "The real party prosecuting these suits is the State of New York, and
78 they are therefore not removable under the act of 1887." On the other hand, in Regan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, holding that a suit in equity against the railroad commissioners of the State of Texas, assented to by that State in the act creating the commission, was not a suit against the State, it was said: "So far from the State being the only real party in interest and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense.

It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws, but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered." While neither of these cases, upon the facts in judgment, for obvious reasons, can be regarded as direct authority in the present case, an analogue of which cannot perhaps be found in the reports, much reliance is placed upon the reasoning in each by counsel respectively, the attorney general contending that the case in hand is within the reasoning of the first, and counsel for defendant that it is within the reasoning of the last. So these cases may serve, if not for authority, at least as pointers to a proper solution of the question of "real interest" under the statute.

The State, in its governmental capacity, having, in previous sections of the statute, made provision for regulating the rate
79 and charges of common carriers for carrying passengers and freight, and provided for a hearing before its board of commissioners of all complaints for a violation of those regulations,

and that the finding of the board shall be *prima facie* evidence of the reasonableness and justness of the charge by it found and required. This section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons: First, "the board of railroad commissioners;" second, "any person or company interested in such order or requirement." Now, while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute out of any money in the treasury not otherwise appropriated, and is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the State treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental has a real pecuniary interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense and is not subject to removal to the United States court, and we so hold.

(2.) Counsel for defendant in his reply brief contends that the judgment should be reversed because the circuit court of
80 Cooper county proceeded to trial when the defendant had no reason to expect that a trial would be insisted on. It appears from the record that the cause came on for trial in the Cooper circuit court in due course nearly two years after defendant's motion for a removal to the U. S. court had been overruled. By the overruling of that motion the defendant was advised in the most direct and formal manner that the circuit court of Cooper county intended to maintain its jurisdiction to try and determine this cause in due course.

Thereupon it chose to stand upon its motion, filed a transcript of the proceedings of the Cooper circuit court in the United States circuit court, and thereafter persistently maintained that the case had been transferred—that the Cooper circuit court had no jurisdiction to proceed further therein—and neglected to make any preparation for its trial in said court up to the very day of the trial, when it filed a written protest, in which, protesting in the strongest terms against the jurisdiction of that court, it asked the court to suspend further action until the next term of court, in order that the defendant might have sufficient time "to establish that this court has no jurisdiction to proceed in this cause or to entertain jurisdiction over the same; or, if the court shall hold that it has such jurisdiction, then to enable the defendant to determine what course it will

pursue and whether or not it will submit to the jurisdiction of the court or whether it will take part in the proceedings of the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding." The court had long since held that it had jurisdiction, and we know of no law or rule of practice by which courts are required to delay the exercise of their jurisdiction until suitors shall have made up their minds as to whether they will submit to it or not. The court committed no error in proceeding with the trial without giving heed to this protest. The judgment of the circuit court is affirmed. All concur except Sherwood, J., absent.

THEO. BRACE, *J.*

81 And afterwards, to wit, on the 8th day of July, 1899, the following further proceedings were had in said cause, viz:

H. W. HICKMAN ET AL., Resp.,
v.
M., K. & T. R'Y Co., App.

Comes now the said appellant, by attorney, and files its motion for a rehearing herein.

Which said motion for a rehearing is in the words and figures following, viz:

82 In the Supreme Court of Missouri, in Banc, April Term, 1899.

W. H. HICKMAN ET AL., Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellants. } No. —.

Motion for Rehearing.

Now comes the above-named appellant and moves the court to grant a rehearing in this cause for the following reasons:

I.

Because the court has overlooked questions decisive of this case which were duly submitted by the appellant in the briefs heretofore filed, in this:

That the appellant complained that the circuit court of Cooper county had erred in refusing to grant a continuance in the case, because of the reason that the plaintiffs and their attorneys, by their conduct, had led the defendant to believe that they recognized the proper jurisdiction over the case as being vested in the Federal court, and to believe that no effort would be made to force a trial of the case in the State court.

And also in this, that the court wholly overlooked the point made by the appellant to the effect that even if an investigation beyond

what appeared upon the face of the record would establish that the case was not removable, the State court had no power to make such investigation, and the exclusive jurisdiction to investigate and determine from anything existing beyond the face of the record whether or not the case was removable was lodged exclusively in the Federal court.

II.

Because the court, in reaching the conclusion which it did, made an investigation outside of what appears upon the face of the record in the case, and because of the conclusion reached by such ulterior investigation determined that the case was not removable, when this court had no power to make such investigation, for the reason,
83 in the first place, that such investigation, as already stated, is lodged exclusively in the Federal court, and, in the next place, because there is nothing in the record to indicate that the court below had attempted to make such investigation and dispose of the case upon any such theory, and therefore this court was attempting upon a mere appeal, not only to review the action of the court below, but to proceed to an investigation wholly outside of anything attempted by the circuit court.

III.

Because this court in deciding the case has assumed to go beyond any controversies or rights involved in this case, and has undertaken to decide the right to remove this case by reason of the supposed interests of the State of Missouri in other possible subsequent controversies and suits, but which rights and interests could not arise or be determined in the present case.

IV.

Because this court in deciding the case rested its opinion and conclusion upon the supposed fact that the State of Missouri had a direct monetary interest in the case, and thereby wholly misconceived the nature and possible effect of this proceeding and of the relation of the parties to it, and at the same time misconceived and misapplied the decisions of the Supreme Court of the United States.

V.

Because the court assumed that this proceeding was regularly commenced by the plaintiffs in pursuance of a certain statute, whereas from the allegations of the plaintiffs' petition and from the evidence introduced by the plaintiffs upon the *ex parte* trial in the circuit court it affirmatively appears that they had not complied with the statute of the State, which this court says authorized the institution of this suit.

GEO. P. B. JACKSON,
Attorney for Appellant.

Received a copy of the above motion this — day of July, 1899.

——— ———,
Attorney for Respondents.

84 And afterwards, to wit, on the 14th day of July, 1899, the following further proceedings were had in said cause, viz:

H. W. HICKMAN ET AL., Resp.,
vs.
M., K. & T. R'Y Co., App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for a rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 20th day of July, 1899, the further following proceedings were had in said cause, to wit:

H. W. HICKMAN ET AL., Respondents,
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Appellant.

Now, at this day, there is presented to the Honorable James B. Gantt, chief justice of the supreme court of Missouri, in chambers, a petition for supersedeas, an assignment of errors, a writ of error to the Supreme Court of the United States, a citation directed to said respondents citing and admonishing them to be and appear at a Supreme Court of the United States on the 19th day of August, 1899; which said writ of error is allowed, said citation signed, and said supersedeas granted upon the said appellant filing a bond, conditioned according to law, in the penal sum of one thousand dollars.

Which said petition for supersedeas is in words and figures as follows, to wit:

In the Supreme Court of Missouri. In Banc.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY,
85 Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. —.

To the Honorable James B. Gantt, chief justice of the supreme court of the State of Missouri:

The undersigned, Missouri, Kansas & Texas Railway Company, respectfully shows to your honor that it has filed in this court an assignment of errors in the above-entitled cause and applied to the clerk of the supreme court of Missouri for the issuance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Missouri.

Wherefore your petitioner prays that, in accordance with sec. 999 of the Revised Statutes of the United States, you sign citations to the above-named H. W. Hickman, James Cowgill, and Joseph Flory, defendants in error under said writ of error from said Supreme Court of the United States, citing them and each of them in due form to be and appear before said Supreme Court of the United States within the time provided by law, and there to show cause, if

any there be, why the judgment of the supreme court of the State of Missouri should not be corrected.

And your petitioner further shows to your honor that there has never been any trial upon the merits of the above-entitled cause of H. W. Hickman *et al. v.* Missouri, Kansas & Texas Railway Company; that your petitioner, relying upon the understanding that the case would only be tried in the circuit court of the United States, to which the same had been removed upon a proper petition and bond filed by this petitioner in due time in the circuit court of Cooper county, Missouri, where said cause originated, made no preparation whatever for the trial of the case upon the merits in said circuit court of Cooper county, Missouri; that your petitioner received no notice whatever of any kind that the same would be pressed for trial on or about the 3rd day of December, 1897, or at any other time; that your petitioner's attorney, who alone had charge of said case, was unable to be present on the said 3rd day of December, 1897, because of the setting of a case in which he was sole counsel on one side for hearing in the Supreme Court of
86 the United States at about that time; and your petitioner further shows to your honor that, notwithstanding the protest filed by the defendant and the request for a postponement, the said cause was taken up in the absence of the defendant and its said attorney and an *ex parte* hearing had, and upon such *ex parte* hearing the court entered a judgment and decree restraining the defendant from collecting certain tolls which the defendant claims it was authorized to collect as the agent of the Boonville Railroad Bridge Company, which was expressly chartered by the State of Missouri for the purpose of transporting persons and freight across the Missouri river, and for which service it was authorized to charge certain tolls.

Your petitioner farther shows to your honor that by virtue of the practice in such cases and under the authority of sec. 1003 of the Revised Statutes of the United States and equity rule 93 your honor is fully authorized and empowered to grant a supersedeas suspending the said decree until the judgment of the supreme court of Missouri can be reviewed by the Supreme Court of the United States, upon the giving of such bond as your honor may require, and upon compliance with the provisions of sec. 1007 of the Revised Statutes of the United States.

Wherefore, in order that your petitioner may furnish said bond and file the same within the time provided by said sec. 1007, it now farther prays that your honor make an order suspending the said judgment and decree of the said circuit court of Cooper county, Missouri, and of the supreme court of the State of Missouri, affirming the said judgment of the circuit court of Cooper county, Missouri, until the Supreme Court of the United States can review the same upon the writ of error aforesaid, and that your honor will fix the amount of the bond required of your petitioner to effect the said supersedeas.

MISSOURI, KANSAS & TEXAS
RAILWAY COMPANY,
By GEO. P. B. JACKSON, *Its Attorney.*

87 And which said assignment of errors — in words and figures as follows, to wit:

In the Supreme Court of Missouri. In Banc.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. —.

Now comes the above-named appellant, and for the purpose of having the judgment of the supreme court of the State of Missouri reviewed upon writ of error from the Supreme Court of the United States, the said Missouri, Kansas & Texas Railway Company submits the following assignment of errors, to wit:

The supreme court of the State of Missouri erred—

I.

In holding and deciding that the State of Missouri was in effect a party to this cause.

II.

In holding and deciding that the State court had authority or jurisdiction to investigate and inquire under the circumstances of this case whether or not the said State of Missouri was in effect the real party to this suit.

III.

In holding and deciding that the provision of the statute of the State of Missouri for defraying the expenses incurred by the railroad commissioners in that suit rendered said State of Missouri liable for the costs of this case, so as to make it the real party in interest.

IV.

In holding and deciding that the possibility of the State of Missouri being entitled to recover a penalty under some contingency subsequent to or which might possibly arise on account of a violation of the judgment that might be rendered in this case gives the State of Missouri such a monetary interest in the result
88 of this case as to make it in effect the real party in interest.

V.

In holding and deciding that the case of Reagan *et al. v.* Farmers' Loan & Trust Company, 154 U. S., 362, was not conclusive of the questions presented in this case.

VI.

In holding and deciding that the laws of the State of Missouri authorized the proceeding commenced by the plaintiffs Hickman,

Cowgill, and Flory against The Missouri, Kansas & Texas Railway Company in the circuit court of Cooper county, Missouri.

VII.

In holding and deciding that this case was not removable from the circuit court of Cooper county, Missouri, to the circuit court of the United States of the central division of the western district of Missouri.

Wherefore, and because of the errors above specified, the said Missouri, Kansas & Texas Railway Company prays that the judgment of the supreme court of the State of Missouri may be reversed.

GEO. P. B. JACKSON,
Attorney for Missouri, Kansas & Texas R'y Co.

And which said order granting supersedeas is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Chambers. In Vacation.

H. W. HICKMAN, JAMES COWGILL, and JOSEPH FLORY, Respondents,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant. } No. —.

Now, on this day, comes the Missouri, Kansas & Texas Railway Company, and presents its petition praying for a citation in
89 pursuance of a writ of error sued out by it as plaintiff in error against H. W. Hickman, James Cowgill, and Joseph Flory, as defendants in error, whereby the said Missouri, Kansas & Texas Railway Company seeks to review and have corrected a judgment entered by the supreme court of the State of Missouri in the above-entitled cause of H. W. Hickman, James Cowgill, and Joseph Flory, respondents, against Missouri, Kansas & Texas Railway Company, appellant, and further praying for an order of supersedeas to suspend the judgment of the circuit court of Cooper county, Missouri, and of the supreme court of the State of Missouri, affirming said judgment of the circuit court of Cooper county, Missouri.

Wherefore, in accordance with the statutes of the United States, I, James B. Gantt, chief justice of the supreme court of the State of Missouri, have this day signed citations to the said H. W. Hickman, James Cowgill, and Joseph Flory.

And it appearing that ample authority exists therefor, and that it is in accordance with the practice provided in such cases by the statutes of the United States and the rules of the Supreme Court of the United States, I, the said James B. Gantt, chief justice of the supreme court of the State of Missouri, do hereby order that the said judgment of the circuit court of Cooper county, Missouri, and of the supreme court of the State of Missouri shall stand suspended with the decision of the Supreme Court of the United States upon the aforesaid writ of error, upon condition, however, that the said

plaintiff in error, Missouri, Kansas & Texas Railway Company, shall within the time prescribed by the laws of the United States, to wit, sixty days from the date of the judgment of the supreme court of the State of Missouri, file in said last-named court a bond in favor of the said defendants in error, W. H. Hickman, James Cowgill, and Joseph Flory, in the sum of one thousand dollars, conditioned that if the said Missouri, Kansas & Texas Railway Company shall abide the decision and judgment which may be rendered by the Supreme Court of the United States on said writ of error, and shall pay all costs that may be adjudged against
90 it in said case, then such bond shall be void; otherwise to remain in full force and effect.

In witness whereof I have hereunto set my hand, at chambers, in the city of Jefferson, Missouri, this 20th day of July, 1899.

JAS. B. GANTT,
Chief Justice of the Supreme Court of Missouri.

And afterwards, to wit, on the 14th day of August, 1899, the further following proceedings were had in said cause, viz:

H. W. HICKMAN ET AL., Respondents,
vs.
M., K. & T. R'Y Co., Appellant.

Now, at this day, comes the said appellant, by attorney, and files its supersedeas bond herein in the sum of one thousand dollars; which said bond is approved, ordered filed, and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, The Missouri, Kansas & Texas Railway Company, as principal, and Lewis C. Nelson and J. M. Nelson, Jr., as sureties, are held and firmly bound unto H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of railroad and warehouse commissioners of the State of Missouri, in the full and just sum of one thousand dollars, to be paid to the said H. W. Hickman, James Cowgill, and Joseph Flory, commissioners, as aforesaid; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the April term, A. D. 1899, of the supreme court of Missouri, in a suit depending in said court between H. W. Hickman, James Cowgill, and Joseph Flory, railroad and
91 warehouse commissioners of the State of Missouri, respondents, and The Missouri, Kansas & Texas Railway Company, appellant, judgment was rendered against the said appellant, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, — a citation directed to the said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States, to be held at Wash-

ington, D. C., in not exceeding thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Missouri, Kansas & Texas Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, [SEAL.]
By JAMES HAGERMAN,
General Solicitor. [SEAL.]
LEWIS C. NELSON. [SEAL.]
J. M. NELSON, JR. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
JAMES B. GANTT,
C. J. Supreme Court of Mo.

92 STATE OF MISSOURI, *set:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in a certain cause entitled H. W. Hickman *et al. vs.* M., K. & T. R'y Co., lately pending in this court, as fully and complete as the same appear of record and on file in my said office.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 18th day of August, A. D. 1899.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No., 17,502. Missouri supreme court. Term No., 127. The Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* H. W. Hickman, James Cowgill, and Joseph Flory, constituting the board of railroad and warehouse commissioners of the State of Missouri. Filed August 31, 1899.

FILED
NOV 7 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Jackson for P. E.

IN THE

Filed Nov. 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLOBY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI.

No. 181.

In Error to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Printing Co., 215 Pine St., St. Louis. J

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,
vs.
H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI. } No. 127.

In Error to the Supreme Court of Missouri.

STATEMENT.

The writ of error in this case is prosecuted to reverse a judgment of the Supreme Court of the State of Missouri affirming a judgment of the Circuit Court

of Cooper County, in that State, rendered under the following circumstances: —

In August, 1895, the plaintiffs commenced a suit returnable to the October Term, 1895, of the Circuit Court of Cooper County, Mo., to enjoin the defendant from making certain charges on passengers and freight crossing the bridge over the Missouri river at Boonville (Rec., pp. 10–12).

Within due time the defendant filed petition and bond in proper form for removal of the case to the United States Court on the ground that the defendant was, as is alleged in the original petition, as well as in the petition for removal, a citizen of the State of Kansas, while the plaintiffs were citizens of the State of Missouri (Rec., pp. 12 and 13).

At the October Term, 1895, the Circuit Court of Cooper County made the following order concerning the petition for removal: —

"The petition for the removal of this cause to the United States Court heretofore filed is now by the court overruled."
(Rec., p. 14.)

Thereupon the defendant procured, and in due time filed in the United States Circuit Court at Jefferson City, a transcript of the proceedings in the case in the Cooper Circuit Court. Thereafter the defendant did not farther appear in the case in the Cooper Circuit Court, and subsequently to the action just mentioned the Cooper Circuit Court, without

any participation therein by the defendant, made an order at the January Term, 1896, continuing the case until the next term of that court, nothing farther was done in the State court for more than a year, and then at the May Term, 1897, the defendant still not appearing or participating, the court made an order again continuing the case until the next term of that court upon the application and request and at the costs of the plaintiffs (Rec., pp. 14 and 15).

During all this time the case was pending in the United States Court, upon an order requiring the plaintiffs to reform their pleadings in accordance with the equity rules prevailing in that court, and was being continued from term to term by agreement to accommodate the plaintiffs. Neither the defendant nor its attorney had any knowledge that any orders of continuance had been made in the State court, or that there was any intention to insist upon a trial in that court, until it was accidentally discovered just prior to December 3d, 1897, that the plaintiffs with their attorneys had gone to Boonville to try the case without any notice of any such intention to the other side. The defendant's attorney, by reason of other engagements, not being able to remain in Boonville, prepared a written protest and left the same to be filed, which was done when the case was called on the 3d of December, the defendant appearing specially only for that purpose.

Notwithstanding the same, the court took up the case for trial and made an order formally overruling,

denying and disregarding the protest and directing the trial to proceed; to which action the defendant excepted. This protest is set forth at length in the judgment (Rec., pp. 15 to 19).

The plaintiffs introduced evidence which they claimed tended to sustain the allegations of their petition. The defendant did not introduce any evidence and only appeared for the purpose of formally presenting the protest and renewing the objections at the time the evidence was offered, and to call to the attention of the court that under the circumstances set forth in the protest no answer had ever been filed in that court, when the objections were again overruled and defendant excepted (Rec., p. 21).

Upon the conclusion of the evidence the court made a finding and entered judgment for the plaintiffs.

Within due time the defendant filed a motion for new trial and also a motion in arrest of judgment (which motions are set forth at length at pages 45 to 46 of the printed record), and among other grounds assigned the following: —

"It appears from the record in the case that due and lawful proceedings had been taken for the removal of the same (this case) to the United States court for the Central Division of the Western District of the State of Missouri, and that a transcript of the proceedings therein had been filed in said last named court where the case is now pending."

Both motions were overruled and exceptions duly saved (Rec., pp. 45 and 46).

Thereafter, in accordance with the leave given, the defendant filed its bill of exceptions and duly prosecuted its appeal to the Supreme Court of the State of Missouri (Rec., p. 47).

The attorney for the defendant in error here, as respondents in the Supreme Court of Missouri, filed their brief in answer to the brief previously filed in accordance with the rules of that court by the appellant, and then for the first time raised the question, which is now presented to this court, for determination, namely: that the State of Missouri was the real party to the suit, brought in the name of Hickman et al., constituting the Board of Railroad Commissioners, and that therefore the case was not removable to the United States Court. The Supreme Court of the State, attempting to distinguish the case at bar from cases decided by this court, sustained that contention, and held that the State of Missouri was the real party, and that therefore the case was not removable, and on May 1st, 1899, a judgment was rendered affirming the judgment of the Circuit Court of Cooper County, Missouri (Rec., p. 47).

At the same time the court handed down and filed in the case an opinion which is fully set forth in the transcript of the record at pp. 47 to 57 as follows: —

In the Supreme Court of Missouri, April Term, 1899. Court in Banc.

H. W. Hickman et al.,
Respondent,

vs.

Mo. Kan. & Tex. Ry. Co.,
Appellant.

OPINION.

This is an appeal by the defendant from a decree and judgment of the Circuit Court of Cooper County, in favor of the plaintiffs.

At the time the suit was instituted the plaintiffs constituted the Board of Railroad and Warehouse Commissioners of the State of Missouri.

The petition is as follows: —

H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,
Plaintiffs,

vs.

The Missouri, Kansas & Texas Railway Company,
Defendant.

Plaintiffs state that they are the regularly elected, duly qualified and acting railroad and warehouse

commissioners of the State of Missouri and constitute the board empowered by law to classify and regulate passenger and freight rates in the State of Missouri. That the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railroad is constructed is a part of the roadway of the same and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, that arbitrary, illegal and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded, on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said

bridge than is authorized by law; that said defendant belongs to the class of railroad corporations designated by the laws of the State of Missouri as "Class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Boonville Bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents so made, demanded and received of each local passenger by said defendant is illegal, improper and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said Railroad and Warehouse Commissioners the sum of five (5) cents per one hundred pounds on freights in lots of less than car loads, and two cents per one hundred pounds on freights in car loads. That said charges so made, demanded and received are excessive, unauthorized and in violation of law.

That on the 22d day of July, 1895, plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, after having duly considered the complaints heretofore filed against the defendant as aforesaid, found that the same were sustained by proper and sufficient evidence and made and entered

of record an order directed to the said defendant railway company that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Boonville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was by said plaintiffs forwarded to the general manager of said defendant's road.

Plaintiffs state that they are informed and believe the fact to be that the defendant is disregarding and ignoring said order and is continuing in violation of law to charge, demand and receive rates in excess of three cents per mile for carrying each passenger over that portion of its road which consists of said bridge, and that said defendant continues to charge, demand and receive freight rates in excess of those authorized by law for carrying freight on that portion of its road of which said bridge over the Missouri river at Boonville constitutes a part.

Plaintiffs therefore ask that this court may issue a writ of injunction herein or such other process, mandatory or otherwise, as may seem necessary in the premises to restrain said defendant from further continuing to violate the law and the finding of said plaintiffs herein, acting as the Board of Railroad and Warehouse Commissioners, aforesaid, that obedience to said order may be required of defendants and that such other and further orders and decrees may be made in this cause as may be seen upon a hearing to be right and proper in the premises.

R. F. WALKER.
Attorney-General, for Plaintiffs.

In due time the defendant appeared and filed its petition and bond for the removal of the cause to the Circuit Court of the United States. The petition being as follows: —

Your petitioner respectfully shows that it is the defendant in the above entitled suit; that at and prior to time of the institution of this suit the defendant was, ever since has been, and now is a corporation created and existing under the laws of the State of Kansas; and that at said times and dates, it was, has been, and now is a citizen of the State of Kansas, and non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit, at the time of the institution thereof, all and each were, ever since have been and now are citizens and residents of the State of Missouri.

That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river, between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

That the controversy in said suit is wholly between citizens of different States, to wit: between your petitioner, a citizen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then, and still are citizens of the State of Missouri, and your petitioner offers herewith a bond,

with good and sufficient security, for its entry in Circuit Court of the United States for the Central Division of the Western District of Missouri, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this Honorable Court to proceed no farther herein, except to make an order for the removal of this case to said United States Circuit Court, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Central Division of the Western District of Missouri, and it will ever pray.

At the October Term, 1895, of the Circuit Court of Cooper County, the defendant's petition for removal was denied, and thereupon the defendant procured and filed in the United States Circuit Court at Jefferson City a transcript of the proceedings in the Cooper Circuit Court. At the January Term, 1896, of the Cooper Circuit Court the case was continued by the court on its own motion. At the May Term, 1897, of the said court, the case was again continued, on application of the plaintiff, to the October Term, 1897, of said court. At which Term, the case, over the protest of the defendant, and its objections to the jurisdiction of said court, was taken up and tried on the evidence of the plaintiffs, without any participation by the defendant in the trial,

and the decree rendered as prayed for in their petition with judgment for costs. Afterwards, in due time, the defendant filed its motion for new trial, and in arrest of judgment, which being overruled, it perfected its appeal to this court.

I.

Under the laws of the United States, the Circuit Courts thereof have original cognizance, concurrent with the courts of the several States of all suits of a civil nature at common law, or in equity, when the matter in dispute exceeds, exclusive of interest, the sum or value of two thousand dollars, and in which the controversy is between citizens of different States (25 U. S. Stat. at Large, p. 434, Sec. 1). Any such suit pending in a State court "may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein; being non-residents of that State" (*Ib.*, Sec. 2).

And by Sec. 3 of said Act it is provided that whenever any party entitled to remove any such suit, "may make and file a petition in such suit in such State at the time or at any time before the defendant is required by the laws of the State or the rules of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. * * * and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that

may be awarded by the said Circuit Court, if such court shall hold that such suit was wrongfully or improperly removed thereto, and also from their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall be the duty of the State court to accept said petition and bond and proceed no further in such suit." * * *

It is contended for the defendant, that when the petition and bond for removal was filed in the case, in the Cooper County Circuit Court, the jurisdiction of that court to take any further proceedings therein except to make an order transferring the case to the Circuit Court of the United States, ceased, and that its proceedings thereafter which culminated in the decree aforesaid was *corum non judice* and void, therefore the decree and judgment should be reversed.

It may be conceded that the petition and bond for removal are in proper form and that the petition states facts which if true are sufficient to authorize the transfer of the case to the Circuit Court of the United States under the statute cited, and it may be further conceded that an issue upon the facts stated in the petition could not be raised and tried in the State court for the purposes of determining the question of its jurisdiction. The State court " must take the facts to be as they are stated in the record and the petition; it has no jurisdiction to pass upon any such question; that is the exclusive province of the Federal court." Black's Dillon on Removal of Causes, § 191, and cases cited 30. The jurisdiction

of the State court, however, is not ousted by the mere filing of the petition and bond. "In order to warrant a removal from a court of a State into a Circuit Court of the United States according to the terms of the Act, the necessary diverse citizenship must exist." Powers v. Chesapeake & Ohio Railway, 169 U. S. 92.

The petition when filed becomes a part of the record and the defendant's right of removal depends upon the facts as they appear from the whole record. Stone v. South Carolina, 117 U. S. 431. As was said by Waite, C. J., in that case: "A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. Yulee v. Vose, 99 U. S. 539, 545; Removal Cases, 100 U. S. 457, 474. It is undoubtedly true, as was said in Steamship Company v. Tugman, 106 U. S. 118, 122, that upon the filing of the petition and bond — the suit being removable under the statute — the jurisdiction of the State court absolutely ceases, and that of the Circuit Court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in Insurance Company v. Pechner, 95 U. S. 183, 185, "his petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not,

in law, shown to the court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the Circuit court begins.

All the issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal, and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes. Removal cases: 100 U. S. 457, 472; Railroad Co. v. Mississippi, 102 U. S. 135, 141; Kerr v. Huidekoper, 103 U. S. 485; Railroad Co. v. Koontz, 104 U. S. 15; Chesapeake & Ohio Railroad Co. v. White, 111 U. S. 134, 137. If the State court proceeds, after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

So that the question whether a removal would

be effected by the filing of the petition and bond remained to be decided by the Cooper Circuit Court, on the face of the record as made up, after the filing of the same, and unless judicially informed by the record so made, that the suit was removable, it might proceed in the exercise of its jurisdiction.

The fact stated in the petition for removal that would entitle the defendant to the removal, was that the plaintiffs are citizens of the State of Missouri, and the defendant is a citizen of the State of Kansas. Now, while this fact is not to be disputed, but taken as true, it further appears from the record that "the controversy" inaugurated by their petition is not between them in their individual character as citizens of the State of Missouri and the defendant, but in their official character as members of "The Board of Railroad and Warehouse Commissioners of the State of Missouri." Hence, it is argued, for the respondents by the Attorney-General, that the controversy is not between citizens of different States but between the State of Missouri and a citizen of the State of Kansas, and as the statute does not authorize the removal of a suit between a State and citizens, and a State cannot be a citizen of any State; that it thus appears from the record that the case was not removable under the statute; the jurisdiction of the Circuit Court of Cooper County was not divested by the application for removal; and it committed no error in proceeding with the case to final judgment. This presents the crucial question on this appeal.

Is this a suit by the State of Missouri against the

defendant? If so, then, beyond question, the case was not removable to the U. S. Court, and the Circuit Court of Cooper County was not divested of its jurisdiction; for it is well settled law that "A suit instituted by a State in one of its own courts against a citizen of another State is not removable to the Circuit Court of the United States on the grounds of diversity of citizenship of the parties." (State of Ala. v. Wolfe, 18 Fed. Rep. 836; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482; State v. South Carolina, 117 U. S. 143; Germania Ins. Co. v. Wisconsin, 119 U. S. 473; Ames v. Kansas, 111 U. S. 449.)

Although the State of Missouri is not a nominal party to the suit; yet if it is the real party in interest, the controversy is between the State and the defendant, and the Federal statute does not apply; and the question whether the State is the actual party to the controversy must be determined by a consideration of the whole record. (In re Ayres, 123 U. S. 443; Carson v. Hyatt, 118 U. S. 279; Hagard v. Southern, 117 U. S. 52; Maryland v. Baldwin, 112 U. S. 490.) The law looks to "things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law." (McNutt v. Bland, 2 How. 9.)

The positive law authorizing this action is Sec. 2653, R. S. 1889. The provisions of which, bearing upon the present inquiry, are as follows: "Where the complaint involves either a private or a public question, as aforesaid, and the commis-

sioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employe thereof, shall violate, refuse or neglect to obey, any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any Circuit Court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of, as the court shall deem reasonable. * * * and if it be made to appear to the court on such hearing * * * that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. * * * And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors,

officers or agents, of the same, or against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. * * * Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general when requested by said commissioners, to prosecute the same. * * * The costs of such proceedings may be, with the approval of the attorney-general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid i h e first instance out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being

prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

By section 2658, it is further provided that: "To defray the necessary expenses of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the State treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the State auditor, issued upon requisition of the railroad commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid."

The general rule is that "When the plaintiff has no real interest in the subject-matter of the controversy, and can derive no advantage from the judgment, but the suit is required to be brought in his name because he holds the formal right to sue, although the action is really prosecuted for the benefit of another, the record plaintiff is only a nominal party, whose citizenship will not affect the right of removal; such right will depend upon the relative citizenship of the real party in interest." Black's Dillon on Removal of Causes, Sec. 86.

Under this statute the suit is brought in the name of the "Board of Railroad Commissioners" because they hold the formal right to sue, but the members of that board neither individually nor collectively, have any interest in the subject-matter of the controversy, and can derive no advantage or benefit,

nor suffer any injury or loss from the judgment therein. In Ferguson v. Ross, 38 Fed. Rep. 161, holding that an action under the laws of New York in the name of "the Shore Inspector" to recover a penalty for depositing prohibited material in the waters of the bay and harbor of New York, which penalty, when recovered, goes into the State treasury, is in effect an action by the State, and therefore not removable under the Act of Congress in question. It was said: "The nominal plaintiff here is an individual, but he sues only in his official chatacter. The suit is brought to enforce a police regulation of the State. He has no personal interest in its subject-matter, not even for his fees or commission, for he is a salaried officer whose compensation is secured irrespective of the result of the suits he may bring. In the event of his removal from office the suit would be continued by his successor, not by himself. Courts will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether a State is the real party to an action brought by or against its officer by a consideration of the whole record" (citing authorities); "the real party prosecuting these suits is the State of New York and they are therefore not removable under the Act of 1887. On the other hand in Regan v. Farmers Loan & Trust Co., 154 U. S. 362, holding that a suit in equity against the railroad commissioners of the State of Texas, assented to by that State, in the act creating the commission, was not a suit against the State. It was said: "So far from

the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense.

It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws, but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property be affected by any decree which may be rendered." While neither of these cases, upon the facts in judgment for obvious reasons, can be regarded as direct authority in the present case, an analogue of which cannot perhaps be found in the reports, much reliance is placed upon the reasoning in each by counsel respectively. The attorney-general contending that the case in hand is within the reasoning of the first and counsel for defendant that it is within the reasoning of the last. So these cases may serve, if not for authority, at least as pointers to a proper solution of the question of "real interest" under this statute.

The State in its governmental capacity having in

previous sections of the statute, made provision for regulating the rate and charges of common carriers for carrying passengers and freight, and provided for a hearing before its Board of Commissioners of all complaints for a violation of those regulations, and that the finding of the Board shall be *prima facie* evidence of the reasonableness and justness of the charges by it found, and required. In this section the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons, first "the board of railroad commissioners," second "any person or company interested in such order or requirement." Now while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the second class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute, out of any money in the treasury not otherwise appropriated, and is, moreover, pecuniarily interested, not only by reason of the liabilities it incurs in the action but because of its pecuniary interest in the judgments which may be obtained and which when pushed to final extremity of execution, may result in the payment of penalties, not directly into the State treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the pub-

lic schools to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State, in addition to its governmental, has a real pecuniary interest in the subject-matter of this controversy and that the suit is being prosecuted for its benefit in every sense, and is not subject to removal to the United States Court, and we so hold.

(2) Counsel for defendant in his reply brief contends that the judgment should be reversed, because the Circuit Court of Cooper County proceeded to trial when the defendant had no reason to expect that a trial would be insisted upon. It appears from the record that the cause came on for trial in the Cooper Circuit Court in due course nearly two years after defendant's motion for a removal to the United States court had been overruled. By the overruling of that motion, the defendant was advised in the most direct and formal manner that the Circuit Court of Cooper County intended to maintain its jurisdiction to try and determine this cause in due course.

Thereupon it chose to stand upon its motion, filed a transcript of the proceedings of the Cooper Circuit Court, in the United States Circuit Court, and thereafter persistently maintained that the case had been transferred; that the Cooper Circuit Court had no jurisdiction to proceed further therein and neglected to make any preparation for its trial in said court, up to the very day of the trial, when it filed a written protest, in which, protesting in the strongest terms against the jurisdiction of that

court, it asked the court to suspend further action until the next term of court in order that the defendant might have sufficient time "to establish that this court has no jurisdiction to proceed in this cause, or to entertain jurisdiction over the same; or if the court shall hold that it has such jurisdiction, then to enable the defendant to determine what course it will pursue, and whether or not it will submit to the jurisdiction of the court, or whether it will take part in the proceedings of the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding." The court had long since held that it had jurisdiction, and we know of no law or rule of practice by which courts are required to delay the exercise of their jurisdiction until suitors shall have made up their minds as to whether they will submit to it or not. The court committed no error in proceeding with the trial without giving heed to this protest. The judgment of the Circuit Court is affirmed. All concur.

THEO. BRACE, J.

The appellant railroad company unsuccessfully moved for a rehearing of the case. (Rec., pp. 57 to 59.) And thereupon filed assignment of errors in the Supreme Court of Missouri. (Rec., pp. 61 and 62.) And also presented to the Chief Justice of the Supreme Court of Missouri a petition for writ of error and for supesedeas, assignment of errors, citation, etc., in order to bring the case here. Thereupon his Honor, James B. Gantt, Chief Justice of

the Supreme Court of the State of Missouri, allowed the writ of error to this court, (Rec., p. 1.) and duly signed the citation (Rec., p. 2) and also signed the order for supersedeas and approved the bond. (Rec., pp. 63 and 64.) It is not considered necessary to trouble the court by referring to the ex parte evidence introduced in the Circuit Court of Cooper County, Missouri, except to say concerning it, that it established more clearly the theory upon which the suit was brought, as alleged in the petition, namely, that the supposed grievance which occasioned the suit was the exaction of excessive freight charges from certain shippers who lived in Boonville, and that these individual shippers had made complaint to the plaintiffs and had thus caused this suit to be brought to afford relief to these complaining parties, and also to show that the railroad company contended, first, that the plaintiffs, assuming to act as Railroad Commissioners, had wholly disregarded the statute of the State, and had not conducted any proceedings in accordance therewith, and that moreover the charges complained of were not collected by the railroad company as freight charges for transportation by it, but as tolls for crossing the bridge over the Missouri river owned by a separate and distinct corporation, which was authorized by act of Congress and by the State of Missouri to construct and maintain the bridge and to collect tolls for the crossing of passengers and freight over the same. The defendants in error (plaintiffs in the suit in the State court) were the individuals who constituted the Board of Railroad Commissioners of the State of

Missouri. Under these facts and circumstances the question now submitted to this court is, was the case removable to the United States court? Or, in other words, did the Circuit Court of Cooper County, Missouri, have jurisdiction to proceed with that case and to render the judgment which was affirmed by the Supreme Court of the State? And this depends upon the farther question, was the State of Missouri in fact the real party to the suit instituted in the Circuit Court of Cooper County, Missouri, and did such fact so appear upon the record as to justify the State court in maintaining jurisdiction and proceeding to the determination of the case.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ASSIGNMENT OF ERRORS.

The Supreme Court of the State of Missouri erred: —

I.

In holding and deciding that the State of Missouri was in fact a party to this cause.

II.

In holding and deciding that the State court had authority or jurisdiction to investigate and inquire under the circumstances of this case whether or not the said State of Missouri was in effect the real party to this suit.

III.

In holding and deciding that the provision of the statute of the State of Missouri for defraying the expenses incurred by the railroad commissioners in that suit rendered said State of Missouri liable for the costs of this case, so as to make it the real party in interest.

IV.

In holding and deciding that the possibility of the State of Missouri being entitled to recover a penalty under some contingency subsequent to or which might possibly arise on account of a violation of the judgment that might be rendered in this case gives the State of Missouri such a monetary interest in the result of this case as to make it in effect the real party in interest.

V.

In holding and deciding that the case of Reagan et al. v. Farmers' Loan and Trust Company, 154 U. S. 362, was not conclusive of the questions presented in this case.

VI.

In holding and deciding that the laws of the State of Missouri authorized the proceeding commenced by the plaintiffs Hickman, Cowgill and Flory against the Missouri, Kansas & Texas Railway Company in the Circuit Court of Cooper County, Missouri.

VII.

In holding and deciding that this case was not removable from the Circuit Court of Cooper County, Missouri, to the Circuit Court of the United States of the Central Division of the Western District of Missouri.

GEO. P. B. JACKSON,
For Plaintiff in Error.

BRIEF.

I.

The Circuit Court of Cooper County was without jurisdiction to try and determine this case. Therefore, the judgment of the Supreme Court of Missouri affirming the judgment of the Circuit Court, should be reversed. When the petition and bond for removal were filed the State court had nothing to do except to make an order transferring the case to the Federal court. The making of such order was not essential to the jurisdiction of the Federal court.

Shepherd v. Bradstreet, 65 Fed. 142.

The language of the Act of Congress, after providing for filing the petition and bond in the State court, is as follows: "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

Act of Congress, March 3, 1887, Sec. 3.

When the proper application for removal is made, the jurisdiction of the State court ceases, whether that court grants or refuses an order of removal. After that the farther proceedings in the State court are "*coram non judice*, and absolutely void."

Virginia v. Rives, 100 U. S. 313;
Stanley v. R. R., 62 Mo. 508;
Berry v. R. R., 64 Mo. 533;
Black's Dillon on Removal of Causes, Sec. 192.

II.

If the State court still assumes to exercise jurisdiction, the party seeking the removal may still continue in the State court and make defense and does not thereby prejudice his right to insist on removal and on the jurisdiction of the Federal court.

Black's Dillon on Removal of Causes, Sec. 193.

If under such circumstances judgment is rendered against him in the State court, and on appeal the same is affirmed in the State Supreme Court, then this court will, on writ of error, reverse the judgment of the State court, because there was no jurisdiction in that court to render any judgment.

Oakley v. Goodnow, 118 U. S. 43;
R. R. v. Dunn, 122 U. S. 513;
Powers v. R. R., 169 U. S. 92–102.

III.

The State courts were without jurisdiction to pass upon the question of removability of the case, because it is conceded that it does not appear *upon the face* of the papers that the State has any interest, but that is to be ascertained, if it can be, by an investigation, and by going beyond the nominal parties. The Federal court alone has power to make that investigation of what exists outside the record.

Black's Dillon on Removal of Causes, Secs. 191 and 192;
R. R. v. Dunn, 122 U. S. 513;
Carson v. Hyatt, 118 U. S. 279;
R. R. v. Daughtry, 138 U. S. 298.

IV.

The State is not a party to this suit, and has no pecuniary interest in it. It has no more interest in this controversy than it has in having the law enforced in any case. The case was therefore removable to the Federal court and the State courts had no jurisdiction over the case after the filing of the petition and bond for removal.

Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362;
Pennoyer v. McConnaughy, 140 U. S. 1;
Hickman v. M. K. & T. Ry. Co., 97 Fed. 113.

V.

The statute of Missouri, under which this suit was commenced, negatives the contention that the State is a party to the proceeding.

R. S. of Mo. 1889, Sec. 2653;
Hickman v. M. K. & T. Ry. Co., 97 Fed. 113.

That statute, as well as the petition in the case, shows that the suit was commenced and prosecuted for certain complaining citizens living in Boonville, Mo., and that the present defendants in error were expressly authorized by the statute to maintain the suit for the benefit of such citizens.

Under such circumstances the defendants in error were to be regarded in the nature of trustees of an express trust, and could maintain the suit in their own names, without joining or naming the persons for whose benefit they sued.

R. S. of Mo. 1889, Sec. 1991.

The jurisdiction of the Federal court, and consequently the right to remove a case, depends on the citizenship of administrators, executors, trustees, receivers and others similarly situated.

New Orleans v. Gaines, 138 U. S. 595;
Coal Co. v. Blatchford, 11 Wall. 172;
Ins. Co. v. Rhoads, 119 U. S. 237;
Knapp v. R. R., 20 Wall. 117;
Gardner v. Brown, 21 Wall. 36;

Dodge v. Tulleys, 144 U. S. 451;
Black's Dillon on Removal of Causes, Secs. 91 to 94.

The defendants in error, plaintiffs in the State court, being citizens of Missouri, suing at the instance and for the benefit of other citizens of that State, and not for the benefit of the State itself — the plaintiff in error, a citizen of the State of Kansas, as defendant in the State court, had the right to remove the case to the Federal court.

GEO. P. B. JACKSON,
For Pltff. in Error.

ARGUMENT.

The questions which are to decide this case are not new in this court. The rules that are to govern are established by numerous decisions and have been clearly defined by the court. All there is to do in this case is to make a proper application of those rules. Whether the judgment of the Supreme Court of the State of Missouri shall be affirmed or reversed depends upon two questions, the first and principal one of which is: Was the State of Missouri in reality the party plaintiff in the suit of Hickman et al. v. M. K. & T. Ry. Co., commenced in the Circuit Court of Cooper County in that State? and second: Do the facts which determine whether or not the State of Missouri was a party to that suit so appear upon the face of the record as to enable a court to determine that question without resorting to any extraneous matters?

If the State was not a party, then the case was clearly removable to the Federal court, and all proceedings in the State courts subsequent to the filing of the petition and bond for removal were *coram non judice* and the judgment of the Supreme Court of the State of Missouri should be reversed.

If the facts necessary to determine the attitude of the State do not appear upon the face of the record, although an investigation of all the facts and circumstances might result in the conclusion that

the State was the real party, still the judgment of the Supreme Court of the State of Missouri was erroneous, and should be reversed, because the Federal courts alone have power and jurisdiction to inquire into matters outside the record in order to determine the question of removability for any reason, and because the State courts had no right to proceed in the case for any purpose after the filing of a proper petition and bond making out a *prima facie* case of removability. Unless the fact that the State was a real party to this suit appeared upon the face of the record as it existed in the Circuit Court of Cooper County at the time the petition and bond were filed, then that court had no authority to proceed any farther in the case until the Federal court would investigate the ulterior matters and determine that the State was the real party, and for that reason remand the case, and unless the Federal court did so remand the case under such circumstances, the State court never could have the right to proceed. While this proposition is only secondary in importance in this case, yet it is sufficient to require a reversal of the judgment of the Supreme Court of the State of Missouri, and we may dispose of that before proceeding to a consideration of the first or principal question in the case.

I.

The facts are undisputed. The defendant within due time filed a proper petition and bond for removal of the case to the Federal court. Although no

formal order of removal was made, a transcript was duly filed in the Federal court. If the case was not removable, then the proper course to pursue was to file a motion in the Federal court to remand, and until the case was remanded the State court had no power or authority to enter a judgment. The rule concerning this matter, although confused in some of the cases, is clearly and well defined. The State court has the power before it surrenders its jurisdiction, even temporarily, to examine the papers in the case, in order to determine whether or not there is a *prima facie* case for removal made out. If there is no proper petition; or if the facts necessary to the jurisdiction of the Federal court do not *prima facie* appear upon the face of the papers; or if there is not a sufficient bond; or if for any similar reason the case is not brought within the statute governing removals, then the State court is not required to surrender its jurisdiction. At the same time the Federal court is not concluded by the judgment of the State court upon its jurisdiction, and it may examine and pass upon the same questions, but there the co-equal powers of the courts upon these removal questions cease. The Federal court may upon a proper plea, or even upon affidavits, inquire into the truth of the facts or matters stated, whereas the State court must take the facts to be as they are stated in the record and the petition for removal. In other words, the State court is governed by the face of the papers and by the statements made in them. If, in order to determine the real merit of the question of jurisdiction, it

is necessary to go beyond the statement of facts or to go deeper than the face of the papers, then the power and the jurisdiction to make that investigation is lodged solely in the Federal court. This subject is fully considered and the authorities cited in Secs. 191 and 192 of Black's Dillon on Removal of Causes.

In Sec. 191 we find, among other things, the following: —

"The question, therefore, presents itself to the State court whether, admitting the facts of the case to be as they appear in the record, and are alleged in the petition for removal, the petitioner has brought himself within the act of Congress, and made it the duty of the State court to accept the petition and bond and proceed no farther in the case; whether the formalities prescribed by the statute have been complied with and the removal papers are legally sufficient on their face to terminate the jurisdiction of the court, this question the State court has authority to determine, and must determine. Or, as it has been otherwise stated, a petition and bond upon an application to remove a case from a State court to a Federal court are based upon a right purely statutory, and must in their terms strictly comply with the provisions of the statute before the State court is ousted of its jurisdiction, and that court has a legal discretion to decline to accept the petition and bond when they are not in compliance with the statutory requirements, and to retain jurisdiction of the case. If the State court decides that the removal papers, in connection with the record, fail to show that the cause is removable, it will deny the application for removal, and proceed with the trial of the

cause. *And in that event, its action, after the final decision of the cause in the appellate court of the State, will be reviewable by the Supreme Court of the United States on error.*"

Then follows a statement and reference to authorities showing that the Federal court has also full power to decide the same question.

Then in Sec. 192 we find the following: —

"When an application for the removal of a cause from a State court to a Federal court is duly and seasonably made by the filing of a proper and sufficient petition and bond, and the removal papers, in connection with the record, show that the case is within the act of Congress, it is the duty of the State court, under the statute, to 'accept said petition and bond and proceed no further in such suit. All rightful jurisdiction of the State court over the cause immediately ceases. It makes no difference whether that court grants or refuses an order of removal. Its jurisdiction being at an end, any further step taken in the cause in that court, or any order, judgment or decree made by it, is erroneous and voidable, if not absolutely void. *And however long the question of the removability of a suit may be litigated in the Federal courts, and although those courts may ultimately decide to remand it to the State court, no valid action or proceeding can be taken in the State court before the remand.*"

See also Sec. 215 of the same work bearing upon this question.

In the case at bar it is not contended that there was any informality or insufficiency in the record or

in the petition for removal which would deprive the defendant of the right to have the case transferred. The sole point now urged is that because the State of Missouri was and is the real party in interest upon one side, therefore the case is not a removable one. This, however, is not a matter that appears upon the face of the petition. The State of Missouri is not a party *eo nomine*. There is no allegation in the plaintiffs' original petition which avers any interest of the State, nor could any court reach the conclusion that the State was in effect the real party to the suit from a mere reading of the allegations of the petition. There must be a farther investigation of the fact governing the attitude, the relations, and the interest of the parties in order to determine that question, and that being the case, under the authority above cited, it was essentially a question to be determined by the Federal court. Therefore, no matter how the question might be ultimately decided, the State court had no power to render any judgment or make any order before that question had been judicially determined by the Federal court, which alone had jurisdiction to determine it.

While I do not agree that, by looking *through* the allegations of the bill and ascertaining by investigation something that lies beyond the facts as pleaded, it will be found that the State is the real party in interest, yet I do agree that it is proper to make such investigation in order to ascertain the real interest and the real party for whose benefit the suit is prosecuted, and it may be conceded that it is

proper to do it in this case. But when we concede these things, we clearly bring the case within the rule that restricts the jurisdiction to the Federal court, at least for the purposes of the preliminary inquiry concerning the proper ultimate jurisdiction.

It becomes important to inquire: What is the face of the record that is spoken of? An examination into the practice in removal proceedings would show that in some cases the investigation was restricted to what appeared upon the face of the petition for removal. Afterwards the rule — very justly and very properly — was enlarged, so that the original pleadings in the case were to be considered, and they together with the petition for removal made the record in the case at that time, and it was from the face of all these that the court might determine. Certainly when it is said *from the face* of the record it means simply those things which are averred in the several documents constituting that record, and not such deductions and conclusions as may be made or reached by combining those pleadings, constituting the record, with other circumstances and matters outside of the record. One has only to read "the record in this case" to ascertain whether or not the State court stopped with what appeared upon the face of that, or went beyond, in order to reach the conclusion that it did. It is true no evidence was introduced, yet it is equally true that that court did take up certain matters which it dealt with as facts, not established, if you please, by the testimony of any witness, but which the court found

were established by the statutes of the State. For instance, the court says that the State has made provision for the payment of the costs and expenses of this litigation. If correct that is a fact, and nothing else. Again, the court says that in certain contingencies the State will be entitled to collect penalties and turn them into the school fund. That is another fact, and neither of these is any the less a fact because they happen to be the result of legislation. It is by using these circumstances, which are only effective in this controversy, if at all, by reason of their being facts, and it is by going out and seizing upon these supposed facts and combining them with the allegations of the petition and thereby finding an ulterior fact namely, that the State is the real party to be benefited or affected, that that court reaches the conclusion that the State is the real party in interest. Waiving for the present the soundness of any argument which the court in its opinion bases upon these circumstances, I submit that if evidence had been introduced to establish the fact that the State had made certain money available for the expenses of the suit, or that it would have the opportunity to realize certain moneys under certain contingencies, there could be no question but that the investigation in connection with such facts must be made exclusively by the Federal court. That the evidence relied upon by the court to establish these facts is to be found in the statutes of the State does not change the nature of the case. It is still an investigation of something beyond that which ap-

pears upon the face of the record, and when the court proceeded to consider the case as it did, and treat the question in the manner that it did, it violated that rule of law which limits the power to make such investigation to the Federal court, and did it without ever considering the above rule of practice.

When the defendants in error invoke the rule which they do, they at once concede that upon a reading of the petition it does not appear that the State is the party in interest. By the argument adopted, they establish the proposition that upon the face of the petition and record some one else than the State is the party, and in order to assert and maintain the proposition which they submit against the jurisdiction of the Federal court, they say that the court is not restricted to the face of the petition, which leads to another conclusion, but that it "will look beyond the parties appearing of record to determine the real party in interest," and will look through the nominal parties plaintiff," and if as the result of this investigation, they discover that some other party than as appears upon the face of the petition is really the party interested in the suit, then they will determine the jurisdiction accordingly; but that means not that the State court *may* do that, but that it *must* be done by the Federal court. As already shown, the State court is restricted to the facts as stated in the petition. If any farther investigation is necessary, if there is to be any looking beyond the parties appearing of record, or if there

is to be any looking through the nominal parties plaintiff, that must be done by the Federal court, and if upon such an investigation it is determined that the cause ought not to be removed, then it is to be remanded by a proper order of the Federal court, and thereupon the jurisdiction of the State court will re-attach, and it may thereafter proceed, but before such proper order of remand by the Federal court the State court is without jurisdiction, and for this reason the Circuit Court of Cooper County should not have proceeded to a trial of the case, for that reason its judgment was void, and the judgment of the Supreme Court of Missouri affirming it should be reversed, even in the absence of any other objection.

II.

Independently of the question of what court shall determine who is the real party to the case, we have the more important and decisive proposition, and that is that the State of Missouri is *not* a party to this suit in any sense. The question has been fully considered by this court in the case of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. While it is true that was not a case of removal, yet it was one in which the jurisdiction of the Federal court was attacked upon the identical question now presented in this case, and in the opinion of the court by Mr. Justice Brewer the jurisdiction was sustained. That was a suit commenced by the Farmers' Loan & Trust Company as trustees in a mortgage upon the International & Great Northern Railroad in

Texas against the defendants, John H. Reagan, William P. McLean and L. L. Foster, Railroad Commissioners of the State of Texas, and Charles A. Culbertson, Attorney-General of the same State, to perpetually enjoin said Railroad Commission and the Attorney-General from instituting any suits for penalties under the law of Texas, or under or by virtue of the tariffs established by said Railroad Commission, and also to perpetually restrain said Railroad Commission from issuing any farther tariffs, and from doing various other acts which they claimed the right to do by virtue of the law of the State of Texas.

The opinion in the case commences as follows: —

"The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the State of Texas, brought by a citizen of another State, and therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this court, especially in the cases of Ex parte Ayers, 123 U. S. 443, and Pennoyer v. McConnaughy, 140 U. S. 1."

Then follow quotations from various cases to the effect that the Federal courts will investigate and ascertain who is the real party regardless of the

nominal party, and pointing out the different classes of cases where it will be held that the State is the real party or otherwise.

Then the opinion proceeds: —

"Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates, is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of State officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the Treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this

case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Then follow some other reasons not necessary to quote here, and the opinion concludes upon that subject as follows: —

"Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States."

The Federal courts have no jurisdiction over a case to which a State is a party, whether it be removed from a State court or be originally instituted in a Federal court. The same reasons and the same rules govern in either case, and therefore the reasoning and the decision in the case just mentioned apply to the case at bar. Unquestionably, under that decision, the Federal court had jurisdiction of the case at bar, and consequently the Circuit Court of Cooper County did not have jurisdiction. I have not found any later case yet reported upon this direct question. It is a fact, however, that recently a number of similar suits have been instituted in the State of Texas against the railroad commissioners in that State and the Federal courts have entertained jurisdiction, and

have granted perpetual injunctions, and now the jurisdiction in such cases is generally conceded. The circumstances of the case against the Texas commission afford stronger grounds for contending that the case was against the State than those in the case at bar. There the purpose was to restrain those defendants who were officers of the State from doing certain things which they claimed the right and power to do by virtue of the laws of the State. The suit against them was to enjoin them from discharging what they claimed was their official duty, and, among other things, to enjoin them from attempting to recover penalties prescribed by the State law. Upon the face of that suit it would seem that their action was for the benefit of the State, but the court looked into the matter far enough to ascertain that in fact the people to be benefited by the acts which were restrained were only a portion of the community who might be interested as shippers over the railroad there involved. An examination of the case at bar will show that the State of Missouri could not be as much interested in or as much affected by this suit as the State of Texas might have been in the suit against her railroad commission, and therefore I say that under that decision the State of Missouri cannot be regarded as a party to this suit. In order to understand just what is involved in this case, we must consider the petition originally filed in the Cooper Circuit Court, and also the statute under which the plaintiffs allege they were acting. The original petition set forth at pp. 10 to 12 of the printed record shows the interest that

was involved, and the interest to be affected by this suit, as well as the cause of its being commenced.

On page 11 it is averred: —

"That informal complaints have heretofore been made to plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passses over said bridge; that plaintiffs, under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded, on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law."

Then follow averments of what charges were exacted and what were lawful, and then a farther averment that having made the investigation aforesaid, the plaintiffs as Railroad Commissioners had ordered that such excessive charges should be discontinued, and that the defendant was disregarding such order, and therefore they pray that an injunction issue to restrain the railroad company from further continuing to violate the law and the finding of the plaintiffs as Railroad Commissioners, and that obedience to the order of such Commissioners be required of the defendant. Here was no effort to recover any

property belonging to the State, nor to recover any money belonging to the State, nor to enforce any penalty exacted by the State, but simply to regulate the charges which might be made against certain passengers and shippers on account of transportation over the defendant's railroad. In other words, it was to regulate a matter between the railroad company on one hand and such individuals as might become passengers or shippers on the other hand. The real controversy was between the defendant and those persons who had made the informal complaints to the board upon some former occasion. The parties to be beneficially affected by the judgment against the defendant were those persons who had made the complaints or who might avail themselves of the rights that would be enforced under a judgment against the defendant in this suit; but in no sense, and to no extent was the State a party any more than, as was said by this court in the Texas case, that it had an interest in a governmental sense in which every State is interested in seeing its citizens protected.

The *ex parte* evidence introduced by the plaintiffs upon the so-called trial in the cooper Circuit Court shows that the State was in no sense interested in this proceeding, but simply that certain citizens of Boonville were seeking to correct a supposed grievance on account of charges made for toll by the Boonville Bridge Company.

If we turn to the statute under which the plaintiffs assumed to act in making the order referred to in their petition, we find that this view of the matter is em-

phasized. Section 2653 of the Revised Statutes of Missouri of 1889 is the immediate authority for bringing this suit. The preceding sections relate to those things which are preliminary to the making of the order by the Railroad Commissioners. If it were a proper occasion to inquire into the merits of the action of the Commissioners there would be no difficulty in showing that they had absolutely disregarded the very statute under which they assumed to act, but it is not necessary to consider that question now, and it is only necessary to notice the provisions of Sections 2646 and 2653, as follows:—

"Section 2646. **Commissioners to see to enforcement of act — Investigate complaints.** — It shall be the duty of the railroad commissioners of this State to see that the provisions of this act are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of this act have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint, and determine the truth of the same. * * *"

"Sec. 2653. **Proceedings when order of commissioners is disobeyed — Circuit Court — Enforce or renew order — Proceedings.** — Where the complaint involves either a PRIVATE or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent, or employe thereof, shall violate, refuse, or neglect to obey any such order or requirement, it *shall be lawful* for the board of railroad commissioners, *or any person or company interested in such order or requirement*, to apply in a summary way, by peti-

tion, to any Circuit Court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents, or servants, in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioner shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and

if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof, may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the State, in the same manner that appeals are taken from such courts in this State in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney-general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not other-

wise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case. (Laws 1887, p. 25, extra session.)"

The opening sentence of the last section seems to refute the contention of the defendants in error that they are in effect the State of Missouri, for it authorizes the action where the complaint involves either a *private* or a public question, and the commissioners have made a lawful order or requirement in relation thereto. It thus appears from the very terms of the statute under which they were proceeding that it related or might relate to *private matters*. Will anyone contend that the action of the commissioners in regard to a *private* matter will make the State a party to any suit that may be brought on account of those private questions? As already shown, the record in this case establishes that the action taken was at the instance of certain *private citizens*, and on account of their interest in the rates that were being charged.

The section farther provides that if the order referred to shall be violated by a common carrier, then it shall be lawful for the Board of Railroad Commissioners, *or any person or company interested in such order or requirement* to apply in a summary way by petition to any Circuit Court, etc., that is, to bring a suit of the kind now before the court. So far from being a proceeding in the interest of the

State, or a proceeding which in effect is by the State, *any individual or any company* having any interest in or being affected by the requirement that may have been made may bring a suit on account of its violation. Under this statute, and for the purposes of a suit under this statute, the Railroad Commissioners stand in no different attitude from any other citizen of the State who may have an interest in or may be affected by the rates charged by the common carrier. The Railroad Commissioners were no more charged with the duty of bringing this suit than was the interested citizen. They were not compelled to sue. It was at their option to sue or not. The citizen could bring the suit in his own name to accomplish exactly the same purposes that would be accomplished by a suit commenced by the Commissioners in their names. Would it be contended, if one of these interested citizens had brought a suit in his own name, that it was not removable because the State of Missouri was the real party in interest? Certainly not. The State would have identically the same interest in a suit so brought by the citizen that it can have in this suit brought by the Commissioners. The object to be accomplished is the same no matter who is the nominal plaintiff. The right involved is the same. The manner of procedure is the same, and since there is no difference whatever in any of the elements or features of the case whether brought in the name of the Commissioners or other citizens, and since it must be conceded that the State could

not be regarded as a party if the individual citizen was the nominal plaintiff, then upon what reason can it be claimed that the State is to be regarded as the real plaintiff when by mere chance the Railroad Commisioners are the nominal plaintiffs? If the suit to accomplish the same purposes, to assert the same rights of shippers, to relieve the shippers from the same burdens and embarrassments, when brought by one of those shippers is removable to the Federal court, then why should not another suit, although conducted in the name of the Railroad Commissioners, but brought for the same purposes, to vindicate the same rights, and to prevent the same wrongs, also be removable to the Federal court? I submit that when we consider the sort of case presented in the petition, and when we consider the provisions of the statute under which the suit was brought, and then do what the Federal courts alone may do, and what we are asked to do here, viz., look beyond the parties appearing of record to determine the real party in interest, we will find that that real party is not the State of Missouri, but the shippers and passengers living in Boonville and other points south of the Missouri river who may desire to travel or ship across the Boonville bridge. The real controversy in this case is between such shippers and passengers on the one hand and the railroad company on the other, and the State of Missouri has no more interest in having an enforcement of the laws applicable to this sort of controversy than it has in the enforcement of the law which protects every citizen in his

person and in his property — that is, an interest in a governmental sense, but not an interest which is to designate the State as a party to a suit that may arise under any of these different laws. The conclusion, therefore, must be that this was a controversy between citizens of different States, and therefore it was removable from the State to the Federal court, and the application for removal having been made in due time, and in due form, the Circuit Court of Cooper County had no farther jurisdiction over the case.

The Supreme Court of Missouri, however, has reached a different conclusion in the opinion set forth at pages 47 to 57 of the printed record; while the U. S. Circuit Court, through Judge Philips, has sustained the contention of the plaintiff in error in overruling a motion to remand this case to the State court. (See opinion in Hickman et al. v. M. K. & T. Ry. Co., 97 Fed. Rep. 113.)

It therefore becomes important for us to examine the opinion of the Supreme Court of Missouri to ascertain if its judgment is sustained by reasons sufficient to justify its affirmance, or whether it is so grounded in error that it must be reversed.

The Supreme Court of the State in effect concedes all that we claim, and admits that the State cannot be regarded as the real party, unless it appears that it has a substantial pecuniary interest in the case, and that court reached the conclusion that the State was the real party because it satisfied itself that the interest of the State was not a governmental interest, but that of an individual litigant

which was to be directly affected by the decree that might be entered in the particular case; that it had a monetary interest in that decision because of a certain collateral arrangement for the payment of the expenses of the Railroad Commissioners, and because of a possible ulterior liability of some one to pay a penalty. Unless this liability for costs, and this probable chance of recovering a penalty can be sustained and be so immediately connected with the present suit as to say that they are the direct and necessary consequence of that suit then I submit that the whole argument of that court must fail. As already said here, and as said by the court in its opinion, the State is not by name a party to this suit. There is no allegation that the suit is instituted or prosecuted for the interest or benefit of the State, but it is said upon the strength of the case of Ferguson v. Ross, 38 Fed. 161, that the courts will look "beyond and through the nominal parties to the record" to ascertain who are the real parties to the suit. If the court had more carefully examined that case it would have discovered that it was a suit brought *directly for the specific and sole purpose of recovering a certain sum of money due to the State of New York by way of penalty*, and moreover the court would have discovered that it was a suit *criminal in its nature*, while everybody knows that it is only "civil suits" that are removable from the State to the Federal courts. These points were made by the court in its decision of the Ferguson-Ross case. They were decisive of that case without looking "through or beyond

the nominal parties to the record," and all that was said concerning that feature of the case may be considered as mere obiter. With all respect to the Supreme Court of Missouri, it does seem very strange that such an unnecessary expression in a Circuit Court decision, made a number of years ago, should be put in the scale and be considered of sufficient weight to balance if not to overcome a recent unanimous opinion of this court.

From an examination of the cases cited in the case of Ferguson v. Ross, it will be found that there is not one of them that bears any similarity either to the case at bar or to the case of Ferguson v. Ross. In several of them the States were parties *eo nomine*. In others the State was the nominal plaintiff to the use of a certain relator named, and in these latter cases it was held that the State was not a party in fact and that the citizenship of the relator would control. The other cases were suits one against the Governor, the other against other officers which were attempts to force these officials to do certain acts for the State, which suits it was held could not be maintained. A more careful examination of the authorities will disclose that wherever the courts have undertaken to "look beyond or through the allegations of the petition" to ascertain the real party in interest it has been where efforts have been made to evade the law which says that a State may not be sued without its own consent. In order to evade this suits have been brought against certain officials of States when in reality the cause of action was against the State itself. In such cases

the courts may well hold that such attempts are but frauds upon the jurisdiction of the court, as well as against the State interested, and therefore jurisdiction will not be entertained in such cases, but certainly such cases are not authority for saying that, when the State has authorized a suit of a certain character to be brought by a particular individual, whether official or otherwise, for the benefit of certain complaining citizens, the State is to be regarded as a party to such suit.

But even if the State court was justified in attempting to conduct an investigation in order to discover what interests are possibly concealed behind "the face of the record" in the case, I insist that it cannot by any reasonable deduction find that the State has any interest in this suit, except as the remotest possibility, and in a collateral way. As already said, the interest which the opinion in this case assumes as the foundation for its conclusion is that the State may pay the costs of this case, or may reimburse the plaintiffs if they pay the costs, or that, in a possible future contingency, there may a penalty attach which the State would be entitled to recover for the benefit of the school fund. Unless one or the other of these two things is sufficient to support the conclusion of the court, then it must fall. It cannot be contended that the State has any interest upon either of these theories as a *direct result* of this suit. Let the decision be as it may, yet, in any event, there will be no judgment which can be enforced against the State, nor upon which it can enforce the collection of a dollar. If the decision is adverse to

the plaintiffs, a judgment for costs under the practice in Missouri will go against them and they must pay it. But, says the opinion in this case, the State by statute has made provision to defray the expenses incurred by the commission. Whether or not the State may ever contribute one cent to the payment of these costs depends upon several other things besides the judgment in this case. It certainly will not follow from the judgment of the court alone that the State shall pay any part of the costs. Even if there is a judgment against the plaintiffs for costs, it is not that judgment which will take any money from the State, but it is first a requisition by the Railroad Commission, and next the drawing of a warrant by the State Auditor, and before these can result in actual outlay by the State, the State Treasurer must have set apart sufficient money to this particular fund, and then he must pay the warrant, and if any one of these parties refuse to do any one of these several acts, namely, making the requisition, drawing a warrant, setting apart the money or paying the amount, the defendant in this case can have no power and could resort to no process whatever to enforce the payment in that way. The judgment of the court would be utterly futile so far as enforcing the payment of any costs from the State is concerned. I submit it is not the possible conduct of any official of the State that determines the effect of a judgment. It is not the possible future policy of the State with regard to a particular matter that may determine its relation to a case. For the purpose of deter-

mining whether the State is a party to this suit our inquiry must be restricted alone to the question, Can any judgment that might be rendered operate directly upon the State one way or the other? That is the only reasonable view to take of the matter. Under that view, I submit that so far as this statute providing for the expenses of the Railroad Commission is concerned, it has no application whatever to any question that is pertinent for consideration in this case, and it does not to any extent whatever tend to establish a liability on the part of the State which can make the State a party to this suit. For the purposes of this argument it is entirely proper to say that the State of Texas has made provision for defraying the expense incurred by her Railroad Commissioners. This very possibility of the State paying the expenses of the litigation in which Railroad Commissioners may be concerned, must have been present in the case of Reagan et al. v. Farmers Loan & Trust Company, decided by this court. It is not a matter that could have escaped the attention of all the attorneys concerned in that case, and of all the members of this court, and we must therefore conclude that in the minds of those attorneys and of the judges of this court that proposition amounted to nothing, and therefore the court held that the State was not a party, notwithstanding the very same possibility that the State, through the operation of some collateral statutory provision, might ultimately pay the amount involved in the costs of the case, just as such a possibility may be present in this case.

The only remaining foundation for the opinion in question is the possibility that at some time in the future the State might have the right to recover a penalty from the defendant in this suit. It ought not to require any argument to show that that could not be the result of this case, nor the effect of any judgment in this case. Let us see what is this theory that the court has seized upon as a basis for the conclusion that the State is the real party in interest in this case. Surely the judgment which the Circuit Court of Cooper County assumed to render in this case in favor of the plaintiffs does not impose any penalty, nor direct the payment of any sum of money, nor contemplate the recovery of any sum of money by the State. It is therefore not the direct and immediate effect of the judgment actually rendered that can give the State a right to collect and recover any money from the defendant.

In the opinion it is said: —

"The State is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action but because of its pecuniary interest in the judgment which may be obtained, and which when pushed to final extremity of execution may result in the payment of penalties, not directly into the State Treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools." (Record, p. 56.)

This supposed pecuniary interest of the State, un-

der the views of that court, is thus made to depend upon a succession of contingencies which may never happen. Under the terms of the statute itself it is only "in case of any disobedience of any such injunction or other process" that it shall be lawful for the court to proceed to the enforcement or collection of any penalties or other sums of money against the defendant. That is to say, the only right that the State can ever have to recover any money is upon the institution of a farther proceeding which may be original, or which may be ancillary to the present one, but it certainly requires some other proceeding before the State can collect any money from the defendant, and the foundation of that other subsequent and necessary proceeding cannot have arisen until after a complete determination of the present case and a disobedience of the judgment which may be rendered in this case. The subsequent proceeding that might be started by the State to enforce the collection of a penalty from the defendant may not be removable, but that does not establish the proposition that the present case is not removable. Moreover, there is no certainty that the contingency will ever happen which is to give the State the right to institute the subsequent proceeding for the enforcement of the penalty and the collection of the money which constitute its supposed pecuniary interest. How can any court, either on original trial or in review of this case, say that the defendant will be guilty of such disobedience as would warrant the institution of such subsequent proceeding? How can any court prejudge the parties so as

to say that the State has a pecuniary interest because a party to the suit *will* at some future time disobey the judgment of one of the courts of the State. In all matters not already established by evidence, direct or circumstantial, of what has taken place, all that the courts can do is to deal in presumptions, and there is no presumption more firmly established and more universally applied than the one that every one is presumed to obey the law. There can be no presumption, and there should be none, to the effect that the defendant will disobey any judgment of any court, and unless the courts are justified in indulging a presumption that it will do so, there is no possible ground upon which it can be said that the State will ever have the right to recover a penalty from the defendant. There is absolutely no substance whatever to the theory that the State has any pecuniary interest in any possible penalties to arise out of the disobedience of the judgment of the court. It is the merest shadow, and upon that intangible and shadowy thing rests the decision of the Supreme Court of Missouri in this case.

The court concedes that there are two classes of parties who may proceed under the statute, first "the Board of Railroad Commissioners," second, "any person or company interested in any such order or requirement."

Then the opinion proceeds:—

"Now while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under the statute by

persons of the first class, its Board of Railroad Commissioners." (Record, p. 56.)

With all due respect to that court, the statute makes no such distinction as is attempted in the opinion. It provides exactly the same proceedings to enforce penalties in case of disobedience of a judgment rendered in such proceeding whether it had been instituted by either of these classes of parties or the other — either by the individuals constituting the Board of Railroad Commissioners or by shippers or passengers as interested parties. The same right to proceed for the enforcement and collection of a penalty for the benefit of the school fund exists in one case as in the other. Therefore, if the argument is sound in one case it ought to be in the other, and ought to establish that in all cases the State is the party in interest no matter in whose name the suit may be brought. But again, what difference is there in the object of the suit whether it be brought in the name of the Railroad Commissioners or in the name of an individual shipper or passenger? The purpose is not to collect money. It is to secure an adjustment and a fixing of rates which shall be the limit to which a railroad company can go in the transaction of the business of a common carrier. Unless the State is the shipper or is the passenger it has no direct and immediate interest in the fixing of such rates. It has no possible interest in such a controversy other than it may have in any controversy which may arise between different classes of the citizens and residents within its borders. It has a govern-

mental interest in seeing that the rights of all are regarded, and that just laws are enforced, and it has no other interest in such a controversy as is involved in this case.

The same contentions were made and the same questions considered on the motion to remand this case from the United States Court, and in a carefully considered opinion Judge Philips held that neither the collateral possibility of the State assuming to pay the costs, nor the remote contingency of realizing something for the school fund was a sufficient pecuniary interest to make the State a party to this suit.

Concerning the latter proposition, he says: "This suggestion cannot command my assent. Such subsequent proceedings, from which such penalties could result, do not inhere in the pending action at bar. They would be essentially contingent and separate. The subsequent action might never arise, as the defendant company might conform. It would also be entirely optional with the railroad commissioners, and any individual interested who is equally authorized to institute such proceedings, whether or not they would ask the court to proceed summarily against the offending roads. Independent of any statutory provision, the State court, in the exercise of its inherent power, could impose a fine for the violation of such injunction, in a contempt proceeding; and such fine, under the general law of the State, would go to the State. And if this fact suffices to constitute the State a party in the original injunction suit, then by the same logic might it be

maintained that the State, in legal contemplation, is a party to every civil suit of injunction."

The opinion also points out that the laws of Texas and Nebraska contain similar provisions concerning costs and penalties, and that neither of these circumstances was considered, either by the attorneys or by the court, as affecting the question of jurisdiction, which was attacked on the ground that the State was the real party. Hickman et al. v. M. K. & T. Ry. Co., 97 Fed. 113.

Another reason why the decision of the State court is wrong is to be found in the statutes of the State. Sec. 1991, R. S. of Mo. 1889 (that section being part of the Code of Practice of the State) provides: —

"An executor or administrator, a trustee of an express trust, or *a person expressly authorized by statute may sue in his own name* without joining with him the person for whose benefit the suit is prosecuted."

Sec. 2653 *expressly* provides that in any case where a common carrier shall violate, refuse or neglect to obey any lawful order or requirement of the board it shall be lawful for the Board of Railroad Commissioners or any other person or company interested in such order or requirement to apply in a summary way by petition to any Circuit Court, etc. Here is direct statutory authority for either one of the classes of persons to bring the suit contemplated by this statute and by virtue of Sec. 1991, they may bring it in their own name without joining any other party for whose benefit the suit is prosecuted. All

the time the suit commenced under Sec. 2653 is to compel an observance of the lawful order or requirement of the Board of Railroad Commissioners. As the object of this suit is the same no matter who may institute it, those persons who are to derive benefit from the observance of the order of the board, and those alone, are the parties for whose benefit the suit is prosecuted. As it is to compel an observance of the order of the commissioners in regard to the rates which may be charged for carrying passengers and freight, then it is clear that only passengers and shippers are to be benefited. Therefore, this suit authorized by the statute to be brought in the name of the commissioners, or in the name of some individual or company interested, is a suit to be prosecuted in the name of such party for the benefit of the passengers and shippers who may be affected by these rates, and not a suit prosecuted for the benefit of the State of Missouri, as a party. It has been decided time and time again that the jurisdiction of the Federal courts, so far as the question of parties is concerned, depends upon the citizenship of administrators, executors, trustees, receivers, and others similarly situated, and not upon the citizenship of the beneficiaries of such parties. The effect then of the several sections of our statute is to make either the railroad commissioners or any other interested party the trustee of an express trust to maintain a suit for the benefit of the persons interested in the rates that may be charged for transporting passengers or freight. It is the citizenship of these trustees that is to determine the right

to remove this case, and not the condition of the party for whose benefit the suit is brought. Therefore, even if it could be said that the State has any interest in this case, it must be that of a beneficiary in the trust created, and not such a relation to the case as to determine the jurisdiction of the Federal court.

But, as we have just seen, the suit is brought for the benefit of those persons interested in the rates to be charged for the transportation of passengers and freight; that is, for the benefit of others than the State of Missouri, and therefore the State cannot be regarded as a party even in the relation of the beneficiary of the proceeding.

It may not be amiss to remark here that the very provision for paying costs, which the court relies upon as one ground for its decision, applies as well to cases instituted by the second class of parties mentioned by the court, namely, any person or company interested in such order or requirement, as it does to the first class, namely, the Board of Railroad Commissioners. The argument based upon that provision of the law, therefore, cannot be consistent with the distinction which the court makes between these two classes of parties who may commence these suits, for the court also says that "in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest." That undoubtedly is true, and yet it has no more pecuniary interest, and no different sort of an interest in any suit commenced by the Railroad Com-

missioners, from the interest it has in a suit brought by anyone else, because the object of the suit is always the same, because the provision concerning costs applies to both alike, and because the provision concerning the possible enforcement of a penalty at some future time applies as much to one as to the other. I beg to direct attention to another matter in which that court seems to have fallen into error concerning the case of Reagan v. Farmers Loan & Trust Company. The court says that that suit commenced in the Federal court was one "assented to by the State in the act creating the commission." The decision of this Court in that case was not made to depend upon any such provision in the statute. Wholly independent of anything contained in the statute, this court expressly and clearly decided that that proceeding was not a suit against the State, and that the citizenship of the members of the Board of Commissioners was available to determine the jurisdiction of the court. While it is true that Mr. Justice Brewer, in his opinion, adverted to a section of the statute providing for the institution of a suit *against the commissioners*, it was done by way of argument to show that the suit was *not* one *against the State*, and that must have been the conclusion, otherwise the Federal Court could not have entertained jurisdiction. If, however, the question of assent is to cut any figure, and if the section of the Texas statute authorizing the institution of a suit against the Board of Railroad Commissioners had the effect to determine the relation of the various persons to that case, so as to lead to the conclusion

that the State was not a party, then clearly the statute of Missouri which authorizes the institution of a suit by certain parties was giving as much assent to the institution of this suit as did the Texas statute give assent to the suit under it, and if the assent under the Texas statute prevents the State of Texas being regarded as a party to that suit, then it is irresistible that the assent given by the statute of Missouri prevents that State from being a party to the suit under her statute.

I have purposely omitted any reference to those cases which sustain the jurisdiction of the Federal courts in suits against State officers attempting to perform duties to and render services for the State under unconstitutional laws. It is not necessary to resort to the reasoning or logic of those cases. Like the case of Reagan v. Trust Company the case at bar does not depend upon the unconstitutionality of any law to sustain the jurisdiction of the Federal court. The decisive question in this case is: who is the party to be benefited by the result of the suit brought in the name of the defendants in error? Who is to gain or lose by the result of that case? If the State of Missouri will gain or lose as a direct pecuniary effect of the suit then it is the real and substantial party and the United States Circuit Court could not entertain jurisdiction. On the other hand if only certain citizens, interested as shippers or passengers on the Missouri, Kansas and Texas Railway, could derive any practical benefit from a judgment in favor of the plaintiffs in that suit, or suffer any substantial inconvenience from a contrary judg-

ment, then the State cannot be regarded as a party, and the United States Circuit Court was right in refusing to remand the case, as shown by the report in 97 Fed. 113.

I submit that the latter view is the only one that can be entetained in this case, and therefore the judgment of the Supreme Court of Missouri should be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Office Supreme Court U.S.
FILED
OCT 14 1901
JAMES H. McKENNEY
Clerk

No. 11.
Add'l Brf. of Jackson for P. in E.

Filed Oct. 14th 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 11.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of Missouri.

ADDITIONAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Ptg. Co., 215 Pine St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 11.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI,
DEFENDANTS IN ERROR,

In Error to the Supreme Court of Missouri.

ADDITIONAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The brief submitted on behalf of the defendant in error asserts many propositions of law about which

there is no dispute, the difference between counsel being principally as to the application that should be made of the decided cases. We do, however, insist that the thirteenth point of the first paragraph, on page 35 of the brief of the defendant in error, to the effect that it is not necessary that the State should have a pecuniary interest in the result of the case brought in the name of some other party, to constitute the State the real party in interest, so as to prevent a removal from the State court, and that a governmental interest is sufficient, is unsound. No authority is cited in support of that assertion, and none, we believe, will be found, while this court expressly decided to the contrary in the case of Reagan v. Farmers' Loan & Trust Co.; and later on we will refer to other cases to the same effect. Before referring to them, however, it may be well to call attention briefly to the fact that most of the cases where the question whether the State is a party or not, has been raised, are cases which have been commenced *against* some officer of the State, and, in those cases, if the State was really affected in a material sense, the decisions turned upon the question of whether some law that was invoked was constitutional or not. Such cases would have to be decided under the effect of the Eleventh Amendment to the Constitution, which denies jurisdiction to the Federal Courts in suits *against* States; but in the case at bar the question of jurisdiction does not depend upon the effect of that amendment to the Constitution, and therefore cases which are decided under that amendment are not di-

rectly controlling in the case at bar, although we may properly turn to them to ascertain the views of this court as to when a State may or may not be regarded as in effect the real party to a suit, although not named as such. Here the want of jurisdiction in the United States Circuit Court, if the State is in effect the real party, arises from the fact that no act of Congress confers such jurisdiction in case of removal from a State court. Here we have no question about bringing a State into court without its consent, because if the State is to be regarded as a party to this suit in any sense, it is as the plaintiff. We may concede at the outset that if, within the meaning of the decisions of this court, the State is really the party in interest, then the case was not removable, and since the State is not named as a party, the real question that we have to consider and determine here is whether the State should be regarded as the real party in this suit, instituted originally by the defendants in error, for the purposes indicated by the petition and the statute under which the suit was brought. It is conceded that a State may have interests of different kinds in litigation, and in the questions involved therein. It may be an interest which has been designated as a "governmental interest," — the same interest that a State has in seeing that all its laws are enforced and the rights of all its citizens recognized and protected. That sort of an interest this court has decided is not sufficient to constitute the State a party to a suit, so as to deprive the Federal Courts of jurisdiction. That sort of interest

the Supreme Court of the State of Missouri, in deciding this particular case, conceded to be insufficient for that purpose, notwithstanding the contention now made by counsel for defendants in error, that it is sufficient. On the other hand, the State may have a material and pecuniary interest which will be affected and operated upon by the judgment that may be rendered in a suit, and if that is the case, then the State is a real party to such suit. Our object, then, in considering this case must be to ascertain in which class of interests would be found any supposed interest which the State may have in this litigation. It seems to be assumed that if a suit is brought by an officer of the State in his representative capacity, that necessarily the State will have such interest in that litigation as to make it a party thereto; but such a position will be found to be untenable upon a full consideration of the subject. A State may, and often does, appear in court to assert some right that it has to or in particular property, or to recover an amount that is due to it, either upon contract or by way of penalty or forfeiture under some law or proceeding in court, or for the purpose of recalling franchises which may have been granted by it, or to vindicate its authority by punishing violations of its laws. In such cases, clearly the State is interested, and in nearly all of them it would be named as the party to the suit, and if it should delegate its power to institute the suit to some official, enabling him to conduct the litigation in his own name, — as was done in the case of Ferguson v. Ross, 38 Fed. 161, — the State would be none the less a

party in interest; but it would not be because the litigation was conducted in the name of a State officer, but because the result of the particular case would operate directly upon the rights or the property of the State. I submit that it is equally true, that if the State authorized the institution of a suit by one of its officers, not for any of the purposes previously mentioned, but for the benefit of some one or more citizens, who were to be directly benefited by the result of the suit, if successful, then the State is no more to be regarded as a party to that suit than if it had been brought in the name of the citizens, to accomplish the same result. The attitude of the defendants in error to this case is such that it is not necessary for us to contend that they had any immediate personal interest in the litigation. The three defendants in error, constituting the Board of Railroad Commissioners, in contemplation of law are in effect a body corporate, although they may not be designated as such in the statute creating the office. Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197. Whenever the law creates a commission or a board composed of several members, and delegates to them any of the power of the State, or confers upon them authority to act for any public or private purpose, they essentially constitute a corporation. Doubtless, they might proceed in their official designation of "The Board of Railroad & Warehouse Commissioners," or they might, as in the present case, proceed in their individual names, specifying their official station by way of

description; but none of these things are controlling. We are to "look through" all these mere forms and ascertain the real nature of the business undertaken by such body. The fact that that board, or the members composing it, commenced a suit in their name, does not change the character of the suit, nor alter the effect that it will have upon the rights or property of individual citizens, or of the State, any more than those rights would be affected if the suit were brought in the name of some individual or in the name of some municipal subdivision of the State. A county, or a city, or a town, is a corporation, and as such is one of the instrumentalities created and used by the State to accomplish its purposes; and yet, if a suit is instituted against a county or a city or a town, or by any of these municipal bodies, and the opposing party is a resident of another State, the Federal Courts may entertain jurisdiction. It would not, perhaps, be a probable thing, yet the statute under which the suit at bar was instituted might have provided that any county through which the railroad runs could institute a suit to accomplish the very purpose sought to be accomplished by this suit, and there would have been no question about the jurisdiction of the Federal Court, unless it had been shown and could now be shown that the only material and pecuniary interest to be affected by that suit was that of the State of Missouri. Therefore, I insist that regardless of the name in which the suit was commenced, regardless of who may be designated as plaintiff, the question that is to

determine the jurisdiction of the Federal Court, is, simply, will the judgment or decree sought operate upon the pecuniary and material interests of the State of Missouri, or upon the interests of one or more of her citizens? If upon the latter, then, certainly, the State was not a party, and the case was removable; and consequently, the State Court no longer had jurisdiction after the proper steps for removal were taken.

The same reasoning upon this question will apply whether the jurisdiction of the Federal Court is to be determined by the Eleventh Amendment to the Constitution or by an act of Congress, governing removals from State Courts. The position which we take here is sustained by various cases decided by this Court, whether they have sustained the jurisdiction or not. The reasoning of the courts either in sustaining or denying the jurisdiction of the Federal Courts, has been upon the lines above suggested.

In re Ayres, 123 U. S. 443, it was said: —

> "In this spirit it (11th Amendment) must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the *only real party* against which *alone in fact* the relief is asked, and against which the judgment or decree effectively operates."

In Pennoyer v. McConnaughy, 140 U. S. 1: —

> "The first class (where the suit is really against the

State) is where the suit is brought against the officers of the State, *as representing the State's action and liability*, and thus making it, though not a party to the record, the real party against which the judgment *will so operate as to compel it to* specifically perform its contracts."

In Reagan v. Trust Co., 154 U. S. 362–390, this court said: —

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

After speaking of the "consent" given to a suit in Travis Co., Texas, — the court said: —

"However, it is not necessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the State," p. 392, and on p. 393, the conclusion is stated that the jurisdiction should be sustained "whether we rest upon the provision of the statute, or upon the

general jurisdiction of the court existing by virtue of the statutes of Congress under the sanction of the Constitution of the United States."

In R. R. Comrs. v. R. R., 24 Florida, 417–464, the court said: —

"It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers because in effect a suit against the State applies only where the interest of the State is through some contract, or some property right of hers, or where her interest is in a suit brought, or threatened, in her own name, to enforce some alleged claim of hers. And it is important to observe the character of the interest. *It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement* as affecting the public at large or as they affect the rights of individuals or corporations, but it *must be an interest of value to herself* as a distinct entity — of value in a material sense. She has an interest in the success of the policy of her laws and in the just administration and execution of those laws, yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, where it is not an otherwise and more direct interest inhering in some separate right or claim of right of her own."

In R. R. v. Dey, 35 Fed. 866–870, the court considered the subject fully and the distinction between a State's interest in a material and pecuniary sense, and a governmental sense was clearly pointed out. Among other things it is said: —

"And in all the cases in which, where the State

> was not a party to the record, and yet the judgment of the Supreme Court was that it was a real party in interest, and therefore the Federal Court without jurisdiction, it will, I think, be found that some contract of the State was the foundation of the litigation; and that those suits, though nominally against State officers, were construed by that court as in fact suits to compel the performance by the State of its contract or to prevent it from carrying into effect measures intended to work a repudiation."

Then at length the opinion considers the laws fixing rates for transportation, and giving authority to the R. R. Commissioners and concludes as to suits arising out of such laws, that

> "the real parties in interest are the shippers and the carriers, and the judgment operates in reality upon these parties alone." * * * "The fact that these defendants, being merely officers, have no interest, is no criterion."

The fact is mentioned that in all cases against R. R. Commissioners the courts have held that they were not suits against a State.

This position was sustained in the Minnesota Case, 35 Fed. 883.

The same views were expressed by the circuit judges in Mercantile Trust Co. v. Reagan, 51 Fed. 529, and in R. R. v. Trammel, 53 Fed. 196–199.

The only case upon the question that I have found since Reagan v. Farmers' Loan & Trust Co. is Fitts v. McGhee, 172 U. S. 516. In that case the jurisdiction of the Federal Court was denied, and in

some respects the case was quite similar to the one at bar; but an examination of the case will show how entirely different it is in its essential features. The court, of course, is familiar with the case, and yet it will not be amiss to refer to some of its features. Originally it was a suit against the State of Alabama, by name, joining the Governor and the Attorney-General. Process was served upon those defendants. Subsequently the Solicitor for a certain judicial district, and individual citizens, were joined as defendants, and then, later, the case was dismissed as to the State, and when the final decree was entered there was a farther order entered, discontinuing the suit as to Mr. Oates, because he had ceased to be the Governor of the State; but all the time the object and purpose of the suit was to enjoin the State and the officers through whom she must act, as her agents and representatives, from proceeding to do certain things in which the State alone was interested; for instance, to enjoin them from proceeding to institute a suit for the forfeiture of the franchises of certain railroad corporations, — a proceeding to which no one but the State could be a party, and must be instituted, either in her name or for her use, — and, farther, to enjoin the officers of the State, who were charged with the institution and conduct of criminal proceedings, from indicting or prosecuting the plaintiffs, or their agents or servants, on account of the violation of certain laws of the State. It is only necessary to state the purpose of that suit and the scope of the injunctions which were granted during the pendency of the suit and made perpetual by the

final decree, to demonstrate that the State, alone, could have been the party interested. The case was based almost entirely upon the authority of *In re* Ayers, 123 U. S. 443, to which the case was assimilated, and the language of the opinion in the Ayers case quoted as expressive of the opinion of this court as to the nature of the case and of the interest involved in Fitts v. McGhee, and, as indicating its view of the latter case, the court quoted the language heretofore set forth, from the opinion in the Ayers case. The court could not have reached any different conclusion in the case of Fitts v. McGhee; but at the same time there is no conflict between that case and the case of Reagan v. Farmer's Loan & Trust Co., which stands undisturbed to this day, and which has been repeatedly followed in numerous cases in the Circuit Courts; and under the authority of that case it must be considered as settled that even in a case where the State officers are defendants, the State is not to be regarded as the party to the suit, when it has no material interest in the result of the case, and when its only interest is that which it may have in a governmental sense. Much more, then, must we conclude that when the State officers have instituted a suit against a citizen of another state, the State is not to be regarded as a party, when its only interest is in a governmental sense.

Recurring again to the statute under which this suit was instituted, I submit that the policy of the law is very clear, when the statute is understood. A preceding section, printed on page 51 of the original brief, made it the *duty* of the Railroad Commission-

ers to proceed to investigate and determine the truth of any complaint that might be made by persons having an interest in the subject. They thus constituted a sort of tribunal to hear and determine the controversy between shippers and passengers, on one hand, and carriers, on the other hand. If the Board of Railroad Commissioners should determine in favor of the complainants, then they, the complainants, had a right to relief from what had been adjudged to be improper action by the common carriers; but under the scheme of the statute the Railroad Commissioners had no necessary connection with the matter beyond that. No duty was imposed upon them to take any farther action on behalf of or in the name of the State. They were given the power, if in their discretion they saw fit to use it, to institute a suit in a proper court against the offending carrier,—but the right to institute such proceeding was not exclusively given to the Railroad Commissioners. The injured citizen, as shipper or passenger, or as one interested in the subject of the order previously made by the Commissioners, was not required to await the action of the Commissioners in instituting other proceedings, nor was the vindication of their right in the premises dependent upon the action of the Commission; but by the same statute they were given authority to proceed, themselves, and in their own names, and to commence such proceeding. Unlike the previous section, which made it the *duty* of the Commissioners to hear and determine the complaint, this section only provides that "in the event of disobedience of the order

made, it *shall be lawful* for the Board of Railroad Commissioners, or any company or person interested in such requirement, to apply in a summary way, by petition, to any circuit Court," etc., — and this authority might be exercised either by the citizen or the Commission in a case where the complaint involved a *private question*. Clearly but one sort of proceeding was contemplated, or rather, the same sort of proceeding was contemplated, whether it might be brought by the Board of Railroad Commissioners or any person or company interested in the order; and whether instituted by one or the other, it was to accomplish the same purpose and to afford the same relief; and that purpose and that relief did not in any sense apply to the material or pecuniary interests of the State, but, on the contrary, as was said in Reagan v. Farmers' Loan & Trust Company, it was simply a controversy between the shippers on one hand and the carrier on the other. Let us concede that the State was the active party, and the only party, interested in the action of the Board of Railroad Commissioners in hearing and determining the complaint presented to them. Up to that point the commissioners occupied the position of a court, and represented the sovereign power of the State in adjudicating upon a controversy between different individuals or corporations. Having fixed the rights of the respective parties to that controversy, it was but proper and natural that some means of securing the beneficial results of that determination should be provided, just as a method is provided by law for

the enforcement of the judgment of an ordinary Court; and though the execution of a judgment is accomplished through the exercise of the power of the State, no one will contend that the State is a party to such proceedings, in such sense and to such extent as to affect the jurisdiction of the Federal Courts in the event of any litigation with the sheriff or other officer attempting to execute such judgment. The rights affected by the determination previously made by the Board of Railroad & Warehouse Commissioners are peculiar, and could not be enforced by an ordinary execution or by any means applicable to an ordinary judgment; and in order that the interested passenger or shipper may not fail in the enjoyment of the right which he has established, the means of its enforcement is provided by the law which says that such enforcement may be accomplished by a proceeding instituted by any person or company interested in the order, — or the same thing may be done by the Board of Railroad Commissioners, acting on behalf of and as representatives and agents of the same parties who are interested in that order. This express delegation of authority to the Board of Railroad Commissioners to institute and prosecute a suit for the benefit of shippers or passengers must be regarded as falling within the provisions of Sec. 1991 of the Statutes of Missouri (p. 68 of the former brief), which provides that "a person expressly authorized by statute may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted." The various statutory pro-

visions of the State of Missouri applicable to the controversy which arose before the Board of Railroad Commissioners of that State bring the case so clearly within the reasoning of Reagan v. Farmers' Loan & Trust Company, that there should be no hesitation in deciding that this was simply a controversy between shippers, on the one hand, and the carrier, on the other hand, in which the State had no such material interest as made it a party to the suit, and that therefore the case was removable from the State to the Federal Court, and the proper step having been taken to that end, the State Court had no farther jurisdiction over the case, and therefore the judgment of the Supreme Court of the State of Missouri must be reversed.

Respectfully submitted,

GEO. P. B. JACKSON,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED
OCT 17 1901
JAMES H. McKENNEY,
Clerk.

No. 11.

Sup? Brf. of Jackson for P.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct. 17, 1901.

No. 11.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN ET AL., DEFENDANTS IN ERROR.

IN ERROR TO SUPREME COURT OF MISSOURI.

There is no merit in the contention of defendants in error that this court is concluded by the construction of the statute of Missouri by the supreme court of that State in this case.

The statute was not before the court for construction. There was no dispute as to the meaning of the statute. The court did not assume to construe it, but only referred to it by way of argument, making certain deductions from its undisputed meaning. Not only was there no clear case of construction, but there was no such established construction as to assimilate it to the rule of *stare decisis*, which this court has held necessary.

Carroll *vs.* Carroll, 16 How., 275–286.

See also—

Olcott *vs.* Fond du Lac Co., 16 Wall., 678.
Venice *vs.* Murdock, 92 U. S., 494.

Especially are the above tests applied and insisted upon in cases involving the jurisdiction of Federal courts.

See Burgess *vs.* Seligman, 107 U. S., 20–33, and 34.
Carroll Co. *vs.* Smith, 111 U. S., 556.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Office Supreme Court U.S.
FILED
DEC 5 1900
JAMES H. McKENNEY
Clerk.

No. 127. Brf. of Crow & Jeffries for Defs.

NO. 127. FILE NO. 17502.

Filed Dec. 5, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

EDWARD C. CROW, Att'y-Gen'l,
SAM B. JEFFRIES, Ass't Att'y-Gen'l,
For Defendants in Error.

TRIBUNE PTG. CO., JEFFERSON CITY.

NO. 127. FILE NO. 17502.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

STATEMENT.

On the 17th day of August, 1895, R. F. Walker, Attorney-General of Missouri, on behalf of the State Board of Railroad and Warehouse Commissioners, instituted a

proceeding against the Missouri, Kansas & Texas Railway Company, in the Circuit Court of Cooper county, for the purpose of restraining it from collecting certain unreasonable and arbitrary freight and passenger tolls on account of passage over a railroad bridge across the Missouri river at Boonville. The petition in said proceeding is as follows:

PETITION.

In the Circuit Court of Cooper county, Missouri, in vacation, 1895.

H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

The Missouri, Kansas & Texas Railway Company, Defendant.

Plaintiffs state that they are the regularly elected, duly qualified and acting Railroad and Warehouse Commissioners of the State of Missouri, and constitute the Board empowered by law to classify and regulate railroad passenger and freight rates in the State of Missouri. That the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railroad is constructed is a part of the roadway of the same, and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs, as the Board of Railroad and Warehouse Commissioners aforesaid, that arbitrary, illegal and improper

charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law; that said defendant belongs to the class of railroad corporations designated by the laws of the State of Missouri as "Class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Booneville bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents so made, demanded and received of each local passenger by said defendant is illegal, improper and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said Railroad and Warehouse Commissioners, the sum of five (5) cents per hundred pounds on freights in car loads. That said charges so made, demanded and received are excessive, unauthorized and in violation of law.

That on the 22nd day of July, 1895, plaintiffs, as the Board of Railroad and Warehouse Commissioners aforesaid,

after having duly considered the complaints heretofore filed against the defendant as aforesaid, found that the same were sustained by proper and sufficient evidence, and made and entered of record an order directed to the said defendant railway company that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Boonville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was, by said plaintiffs forwarded to the general manager of said defendant's road.

Plaintiffs state that they are informed and believe the fact to be that the defendant is disregarding and ignoring said order, and is continuing in violation of law to charge, demand and receive rates in excess of three cents per mile for carrying each passenger over that portion of its road which consists of said bridge, and that said defendant continues to charge, demand and receive freight rates in excess of those authorized by law for carrying freight on that portion of its road, of which said bridge over the Missouri river at Booneville, constitutes a part.

Plaintiffs therefore ask that the Court may issue a writ of injunction herein or such other process, mandatory or otherwise, as may seem necessary in the premises, to restrain said defendant from further continuing to violate the law and the finding of said plaintiffs herein, acting as the Board of Railroad and Warehouse Commissioners aforesaid, that obedience to said order may be required of defendant and that such other and further orders and decrees may be made in this cause as may seem, upon a hearing, to be right and proper in the premises.

R. F. WALKER, Attorney-General,
For Plaintiffs.

At the October term, 1895, of the said Circuit Court of Cooper county, the plaintiff in error by its attorney, George P. B. Jackson, filed and presented to the Court, a petition for

removal into the Circuit Court of the United States in and for the Central Division of the Western District of Missouri. The petition for removal was as follows:

PETITION FOR REMOVAL TO UNITED STATES COURT.

In the Circuit Court of Cooper County, Missouri, October term, 1895.

H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners, of the State of Missouri, Plaintiffs,

vs.

Missouri, Kansas & Texas Railway Company, Defendant.

Your petitioner respectfully shows that it is the defendant in the above entitled suit; that at and prior to time of the institution of this suit the defendant was, ever since has been, and now is a corporation created and existing under the laws of the State of Kansas; and that at said times and dates, it was, has been and now is a citizen of the State of Kansas, and a non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit, at the time of the institution thereof, all and each were, ever since have been and now are citizens and residents of the State of Missouri.

That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river, between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

That the controversy in said suit is wholly between citizen of different states, to wit: between your petitioner, a citi-

zen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then, and still are citizens of the State of Missouri, and your petitioner offers herewith a bond, with good and sufficient security, for its entry in the Circuit Court of the United States for the Central Division of the Western District of Missouri, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this Honorable Court to proceed no farther herein, except to make an order for the removal of this case to said United States Circuit Court, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Central Division of the Western District of Missouri, and will ever pray.

GEO. P. B. JACKSON,
Attorney for Petitioner.

Along with the petition for removal, plaintiff in error filed its bond in the sum of five hundred dollars ($500), as provided by the statutes of the United States in such cases.

On the 30th of October, 1895, at said October term, the petition for removal was overruled.

The case was then continued from term to term until the 3rd day of December, 1897, and at the October term thereof, when trial was had, in which plaintiff in error refused to participate, objecting to the jurisdiction of the Court on the ground that the District Court had supervision of the same.

At the trial, evidence was introduced in proof of the allegations in the petition, and the Court found for defendants in error, rendering the following judgment:

"W. H. Hickman et al., Plaintiffs,

vs.

Missouri, Kansas & Texas Railway Company, Defendants.

Now comes the plaintiffs, by their attorney, Edward C. Crow, Attorney-General of the State of Missouri, and the defendant refusing to take part in the trial, the Court proceeds with the same and doth hear the pleadings and evidence on the part of the plaintiffs and the same being fully considered, the Court doth find: That the plaintiffs are the regularly elected, duly qualified and acting Railroad and Warehouse Commissioners of the State of Missouri, and constitute the Board empowered by law to classify and regulate railroad passenger and freight rates in the State of Missouri. That the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard in the State of Missouri; that said bridge over which said railway is constructed is a part of the roadway of the said defendant and is used as such; that said bridge is under the control and management of the said defendant; that complaint was legally made to plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid that arbitrary, illegal and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under authority given them, as the Board of Railroad and Warehouse Commissioners of the State of Missouri, proceeded, on the 16th day of July, 1895, after legal and proper notice had been given to the defendant, to examine into and determine upon

the reasonableness of the charges made by said defendant for carrying freight and passengers over the said bridge; that defendant belongs to the class of railroads designated as "Class A," and that defendant is only authorized by law to charge passengers at the rate of three cents per mile each; that said bridge does not exceed one mile in length; that defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; and in addition thereto, makes an arbitrary charge of 25 cents for carrying each local passenger on its line of road over said bridge; that said charge of 25 cents so made, demanded and received of each local passenger by defendant is illegal; that defendant illegally charges and collects on freights transported over said bridge and between local stations upon the line of its railway, in addition to the duly established rates for such transportation as shown in tariffs of rates filed by defendant in the office of plaintiffs, the sum of five cents per one hundred pounds on freight in lots of less than car loads, and two cents per one hundred pounds on freight in car loads; that defendant was legally ordered and directed by plaintiffs that said illegal and arbitrary charges so made be discontinued; that said order of plaintiffs to defendant has been and is being by defendant ignored and disregarded, and defendant continues to charge, demand and receive freight and passenger rates and charges in excess of those authorized by law for carrying freight and passengers on that portion of its road of which said bridge known as the "Booneville Bridge," constitutes a part. And the Court doth further find that the matters and facts set forth in plaintiffs' petition are true. Wherefore, the premises having been considered, it is ordered, adjudged and decreed by the Court that the defendant be and is forever enjoined and restrained from further demanding, charging or receiving the said arbitrary sum of 25 cents or any other

arbitrary sum from each local passenger over that portion of its road which consists of said bridge in addition to the legal rate of three cents per mile for each passenger so carried by defendant. And that defendant be forever restrained and enjoined from further demanding, charging or receiving the arbitrary sum of five cents per one hundred pounds on freights less than car loads, and two cents per one hundred pounds on freights in car loads, over that portion of its road, which consists of said bridge, or any other sum on said shipments in addition to the duly and legally established rates for the transportation of freights over defendant's said road, and that plaintiffs have and recover from defendant their costs in this behalf laid out and expended, and that execution issue therefor.

It is further ordered that defendant be served with a copy of this decree."

Plaintiff in error although failing and refusing to participate in the trial of the case, afterwards appeared and filed its motion for a new trial, and a motion in arrest of judgment, which was by the Court overruled.

An appeal was thereupon taken to the Supreme Court of the State.

After the Circuit Court of Cooper county had overruled the petition for removal of the case to the District Court, the plaintiff in error procured and filed, in the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, a transcript of the proceedings in the case. A motion to remand was interposed by judgment, which were by the Court overruled.

The matter was presented to the Supreme Court of the State of Missouri upon the appeal thereto previously taken, at the April term, 1899, which resulted in an affirmance.

OPINION OF SUPREME COURT OF MISSOURI.

The opinion of the Supreme Court of Missouri in affirming the judgment is as follows:

"This is an appeal by the defendant from a decree and judgment of the Circuit Court of Cooper county in favor of the plaintiffs.

At the time the suit was instituted the plaintiffs constituted the Board of Railroad and Warehouse Commissioners of the State of Missouri.

The petition is as follows:

H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Plaintiffs,

vs.

The Missouri, Kansas & Texas Railway Company, Defendant.

"Plaintiffs state that they are the regularly elected, duly qualified and acting Railroad and Warehouse Commissioners of the State of Missouri, and constitute the Board empowered by law to classify and regulate passenger and freight rates in the State of Missouri. That the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railroad is constructed is a part of the roadway of the same and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs as the Board of Railroad

and Warehouse Commissioners aforesaid, that arbitrary, illegal and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs, under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded, on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law; that said defendant belongs to the class of railroad corporations designated by the laws of the State of Missouri as "Class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Booneville bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents so made, demanded and received of each local passenger by said defendant, is illegal, improper and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said Railroad and Warehouse Commissioners, the sum of five cents per one hundred pounds on freights in lots of less than car loads, and two cents per one hundred pounds of freight in car loads. That said charges so made, demanded and received are excessive, unauthorized and in violation of law.

"That on the 22nd day of July, 1895, plaintiffs, as the Board of Railroad and Warehouse Commissioners aforesaid, after having duly considered the complaints heretofore filed against the defendant as aforesaid, found that the same were sustained by proper and sufficient evidence, and made and entered of record an order directed to the said defendant railway company that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Booneville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was by said plaintiffs forwarded to the general manager of said defendant's road.

"Plaintiffs state that they are informed and believe the fact to be that the defendant is disregarding and ignoring said order and is continuing in violation of law to charge, demand and receive rates in excess of three cents per mile for carrying each passenger over that portion of its road which consists of said bridge, and that said defendant continues to charge, demand and receive freight rates in excess of those authorized by law for carrying freight on that portion of its road of which said bridge over the Missouri river at Booneville constitutes a part.

"Plaintiffs, therefore, ask that this Court may issue a writ of injunction herein or such other process, mandatory or otherwise, as may seem necessary in the premises, to restrain said defendant from further continuing to violate the law and the finding of said plaintiffs herein, acting as the Board of Railroad and Warehouse Commissioners aforesaid, that obedience to said order may be required of defendant, and that such other and further orders and decrees may be made in this cause as may seem, upon a hearing, to be right and proper in the premises."

In due time the defendant appeared and filed its petition and bond for the removal of the cause to the circuit court of the United States, the petition being as follows:

"Your petitioner respectfully shows that it is the defendant in the above entitled suit; that at and prior to the time of the institution of this suit the defendant was, ever since has been, and now is, a corporation created and existing under the laws of the State of Kansas; and that at said times and dates, it was, has been, and now is, a citizen of the State of Kansas, and non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit, at the time of the institution thereof, all and each were, ever since have been and now are, citizens and residents of the State of Missouri. That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river, between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars. That the controversy in said suit is wholly between citizens of different States, to wit: Between your petitioner, a citizen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then, and still are, citizens of the State of Missouri, and your petitioner offers herewith a bond, with good and sufficient security, for its entry in the circuit court of the United States for the Central Division of the Western District of Missouri, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this Honorable Court to proceed no farther herein, except to make an order for the removal of this case to said United States circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of

the United States in and for the Central Division of the Western District of Missouri, and it will ever pray."

At the October term, 1895, of the Circuit Court of Cooper county the defendant's petition for removal was denied, and thereupon the defendant procured and filed in the United States Circuit Court at Jefferson City a transcript of the proceedings in the Cooper circuit court. At the January term, 1896, of the Cooper Circuit Court the case was continued by the Court on its own motion. At the May term, 1897, of the said Court, the case was again continued, on application of the plaintiff, to the October term, 1897, of said Court. At which term, the case, over the protest of the defendant and its objections to the jurisdictions of said Court, was taken up and tried on the evidence of the plaintiffs, without any participation by the defendant in the trial, and the decree rendered as prayed for in their petition, with judgment for costs. Afterwards, in due time, the defendant filed its motion for new trial, and in arrest of judgment, which being overruled, it perfected its appeal to this Court.

(1) Under the laws of the United States, the circuit courts thereof have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, when the matter in dispute exceeds, exclusive of interest, the sum or value of two thousand dollars, and in which the controversy is between citizens of different states. (25 U. S. St. at Large, p. 434, sec. 1.) Any such suit pending in a state court "may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that State." (Ib., sec. 2.)

And by section 3 of said act it is provided that whenever any party entitled to remove any such suit, "may make and file a petition in such suit in such state at the time, or at any time before the defendant is required by the laws of

the state or the rules of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff * * * and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit."

It is contended for the defendant, that when the petition and bond for removal was filed in the case, in the Cooper county circuit court, the jurisdiction of that court to take any further proceedings therein except to make an order transferring the case to the circuit court of the United States, ceased, and that its proceedings thereafter which culminated in the decree aforesaid was *coram non judice* and void, therefore the decree and judgment should be reversed.

It may be conceded that the petition and bond for removal are in proper form and that the petition states facts which if true are sufficient to authorize the transfer of the case to the circuit court of the United States under the statute cited, and it may be further conceded that an issue upon the facts stated in the petition could not be raised and tried in the State court for the purposes of determining the question of its jurisdiction. The State court "must take the facts to be as they are stated in the record and the petition; it has no jurisdiction to pass upon any such question; that is the exclusive province of the Federal Court." (Black's Dillon on Removal of Causes, sec. 191, and cases, note 30.) The jurisdiction of the State court, how-

ever, is not ousted by the mere filing of the petition and bond. "In order to warrant a removal from a court of a state into a circuit court of the United States, according to the terms of the act, the necessary diverse citizenship must exist." (Powers vs. Chesapeake & Ohio Railway Co., 169 U. S. loc. cit. 99.)

The petition when filed becomes a part of the record, and the defendant's right of removal depends upon the facts as they appear from the whole record. (Stone vs. South Carolina, 117 U. S. 430.) As was said by Waite, C. J., in that case: "A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. (Yulee vs. Vose, 99 U. S. 539, 545; Removal Cases, 100 U. S. 457, 474.) It is undoubtedly true, as was said in Steamship Company vs. Tugman, 106 U. S. 118, 122, that upon the filing of the petition and bond —the suit being removable under the statute—the jurisdiction of the state court absolutely ceases, and that of the circuit court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in Insurance Company vs. Pechner, 95 U. S. 183, 185, 'his petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the Court that it can not " proceed further with the suit." Having once acquired jurisdiction, the Court may proceed until it has been judicially informed that its power over the cause has been suspended.' The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed,

and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends and that of the circuit court begins.

"All issues of fact made upon the petition for removal must be tried in the circuit court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes.

Removal Cases, 100 U. S. 457, 472.

Railroad Co. vs. Mississippi, 102 U. S. 135, 141.

Kern vs. Huidekoper, 103 U. S. 485.

Railroad vs. Koontz, 104 U. S. 15.

Chespeake & Ohio Railroad Co. vs. White, 111 U. S. 134, 137.

If the State court proceeds after a petition for removal it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

So that the question whether a removal would be effected by the filing of the petition and bond remained to be decided by the Cooper circuit court, on the face of the record as made up, after the filing of the same, and unless judicially informed by the records so made that the suit was removable, it might proceed in the exercise of its jurisdiction.

The fact stated in the petition for removal that would entitle the defendant to the removal, was that the plaint-

iffs are citizens of the State of Missouri, and the defendant is a citizen of the State of Kansas. Now, while this fact is not to be disputed, but taken as true, it further appears from the record that "the controversy" inaugurated by their petition is not between them in their individual character as citizens of the State of Missouri and the defendant, but in their official character as members of "The Board of Railroad and Warehouse Commissioners of the State of Missouri." Hence, it is argued, for the respondents by the Attorney-General, that the controversy is not between citizens of different States, but between the State of Missouri and a citizen of the State of Kansas, and as the statute does not authorize the removal of a suit between a state and citizens, and a state cannot be a citizen of any state; that it thus appears from the record that the case was not removable under the statute; the jurisdiction of the circuit court of Cooper county was not divested by the application for removal; and it committed no error in proceeding with the case to final judgment. This presents the crucial question on this appeal.

Is this a suit by the State of Missouri against the defendants? If so, then beyond question, the case was not removable to the United States court, and the circuit court of Cooper county was not divested of its jurisdiction; for it is well settled law that "a suit instituted by a state in one of its own courts against a citizen of another State is not removable to the circuit court of the United States on the grounds of diversity of citizenship of the parties."

State of Alabama vs. Wolffe, 18 Fed. Rep. 836.

Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482.

Stone vs. South Carolina, 117 U. S. 430.

Germania Ins. Co. vs. Wisconsin, 119 U. S. 473

Ames vs. Kansas, 111 U. S. 449.

Although the State of Missouri is not a nominal party to the suit, yet if it is the real party in interest, the controversy is between the State and the defendant, and the Federal statute does not apply; and the question whether the State is the actual party to the controversy must be determined by a consideration of the whole record.

In re Ayers, 123 U. S. 443.

Carson vs. Hyatt, 118 U. S. 279.

Hagood vs. Southern, 117 U. S. 52.

Maryland vs. Baldwin, 112 U. S. 490.

The law looks to "things, not names, to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law."

McNutt vs. Bland, 2 How. loc. cit. 14.

The positive law authorizing this action is section 2653, Revised Statutes 1889. The provisions of which, bearing upon the present inquiry, are as follows: "Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employe thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the Court shall deem

reasonable * * * and if it be made to appear to the Court on such hearing * * * that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same * * * And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. * * * Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the Attorney-General, when requested by said commissioners, to

prosecute the same. * * * The costs of such proceedings may be, with the approval of the Attorney-General and Governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

By section 2658, it is further provided that: "To defray the necessary expenses of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the State Treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the State Auditor, issued upon requisition of the railroad commissioners, approved by the Governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid."

The general rule is that "when the plaintiff on the record has no real interest in the subject-matter of the controversy, and can derive no advantage from the judgment, but the suit is required to be brought in his name because he holds the formal right to sue, although the action is really prosecuted for the benefit of another, the record plaintiff is only a nominal party, whose citizenship will not affect the right of removal; such right will depend upon the relative citizenship of the real party in interest."

Black's Dillon on Removal of Causes, sec. 86.

Under this statute the suit is brought in the name of the "Board of Railroad Commissioners" because they hold

the formal right to sue, but the members of the board, neither individually or collectively, have any interest in the subject-matter of the controversy, and can derive no advantage or benefit, nor suffer any injury or loss from the judgment therein. In Ferguson vs. Ross, 38 Fed. Rep. 161, holding that an action under the laws of New York in the name of "the Shore Inspector" to recover a penalty for depositing prohibited material in the waters of the bay and harbor of New York, which penalty, when recovered, goes into the state treasury, is in effect an action by the state, and therefore not removable under the act of Congress in question, it was said: "The nominal plaintiff here is an individual, but he sues only in his official character. The suit is brought to enforce a police regulation of the State. He has no personal interest in its subject-matter, not even for his fees or commission, for he is a salaried officer, whose compensation is secured irrespective of the result of the suits he may bring. In the event of his removal from office the suit would be continued by his successor, not by himself. Courts will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether a state is the real party to an action brought by or against its officer by a consideration of the whole record" (citing authorities). "The real party prosecuting these suits is the state of New York, and they are therefore not removable under the act of 1887." On the other hand, in Regan vs. Farmers' Loan and Trust Co., 154 U. S. 362, holding that a suit in equity against the railroad commissioners of the state of Texas, assented to by that state, in the act creating the commission, was not a suit against the state. It was said: "So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are

the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered."

While neither of these cases, upon the facts in judgment, for obvious reasons, can be regarded as direct authority in the present case, an analogue of which cannot, perhaps, be found in the Reports, much reliance is placed upon the reasoning in each by counsel respectively; the Attorney-General contending that the case in hand is within the reasoning of the first, and counsel for defendant that it is within the reasoning of the last. So these cases may serve, if not for authority, at least as pointers to a proper solution of the question of "real interest" under this statute.

The State in its governmental capacity, having in previous sections of the statute made provision for regulating the rate and charges of common carriers for carrying passengers and freight, and provided for a hearing before its board of commissioners of all complaints for a violation of those regulations, and that the finding of the board shall be *prima facie* evidence of the reasonableness and justness of the charges by it found, in this section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons, first "the board of railroad commissioners;" second, "any person or company interested in such order or requirement." Now while in actions

under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute, out of any money in the treasury not otherwise appropriated, and is, moreover, pecuniarily interested, not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which, when pushed to final extremity of execution, may result in the payment of penalties, not directly into the State Treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental, has a real pecuniary interest in the subject-matter of this controversy and that the suit is being prosecuted for its benefit in every sense, and is not subject to removal to the United States court, and we so hold.

(2) Counsel for defendant, in his reply brief, contends that the judgment should be reversed, because the circuit court of Cooper county proceeded to trial when the defendant had no reason to expect that a trial would be insisted on. It appears from the record that the cause came on for trial in the Cooper circuit court in due course nearly two years after defendant's motion for a removal to the United States court had been overruled. By the overruling of that motion, the defendant was advised in the most direct and formal manner that the circuit court of Cooper county intended to maintain its jurisdiction to try and determine this cause in due course.

Thereupon it chose to stand upon its motion, filed a transcript of the proceedings of the Cooper circuit court in the United States court, and thereafter persistently maintained that the case had been transferred; that the Cooper circuit court had no jurisdiction to proceed further therein and neglected to make any preparation for its trial in said court, up to the very day of the trial, when it filed a written protest in which protesting in the strongest terms against the jurisdiction of that court, it asked the Court to suspend further action until the next term of court in order that the defendant might have sufficient time "to establish that this Court has no jurisdiction to proceed in this cause, or to entertain jurisdiction over the same; or if the Court shall hold that it has such jurisdiction, then to enable the defendant to determine what course it will pursue, and whether or not it will submit to the jurisdiction of the Court, or whether it will take part in the proceedings of the case, still protesting against the jurisdiction of the Court, or whether it will refuse to appear and take any part in the proceeding." The Court had long since held that it had jurisdiction, and we know of no law or rule of practice by which courts are required to delay the exercise of their jurisdiction until suitors shall have made up their minds as to whether they will submit to it or not. The Court committed no error in proceeding with the trial without giving heed to this protest. The judgment of the circuit court is affirmed. All concur except Sherwood, J., absent.

Plaintiff in error thereupon filed a motion for a rehearing, which was as follows:

MOTION FOR REHEARING.

Now comes the above named appellant and moves the Court to grant a rehearing in this cause for the following reasons:

I.

Because the Court has overlooked questions decisive of this case, which were duly sibmitted by the appellant in the briefs heretofore filed, in this:

That the appellant complained that the Circuit Court of Cooper county had erred in refusing to grant a continuance in the case, because of the reason that the plaintiffs and their attorneys, by their conduct, had led the defendant to believe that they recognized the proper jurisdiction over the case as being vested in the Federal Court, and to believe that no effort would be made to force a trial of the case in the State court.

And also in this, that the Court wholly overlooked the point made by the appellant to the effect that even if an investigation beyond what appeared upon the face of the record would establish that the case was not removable, the State Court had no power to make such investigation, and the exclusive jurisdiction to investigate and determine from anything existing beyond the face of the record whether or not the case was removable was lodged exclusively in the Federal court.

II.

Because the Court, in reaching the conclusion that it did, made an investigation outside of what appears upon the face of the record in the case, and because of the conclusion reached by such ulterior investigation determined that the case was not removable, when this Court had no power to make such investigation, for the reason, in the first place, that such investigation, as already stated, is lodged exclusively in the Federal Court, and, in the next place, because there is nothing in the record to indicate that the Court below had attempted to make such investigation and dispose

of the case upon any such theory, and therefore this Court was attempting upon a mere appeal, not only to review the action of the Court below, but to proceed to an investigation wholly outside of anything attempted by the Circuit Court.

III.

Because this Court in deciding the case has assumed to go beyond any controversies or rights involved in this case, and has undertaken to decide the right to remove this case by reason of the supposed interests of the State of Missouri in other possible subsequent controversies and suits, but which rights and interests could not arise or be determined in the present case.

IV.

Because this Court in deciding the case rested its opinion and conclusion upon the supposed fact that the State of Missouri had a direct monetary interest in the case, and thereby wholly misconceived the nature and possible effect of this proceeding and of the relation of the parties to it, and at the same time misconceived and misapplied the decisions of the Supreme Court of the United States.

V.

Because the Court assumed that this proceeding was regularly commenced by the plaintiffs in pursuance of a certain statute, whereas from the allegations of the plaintiffs' petition and from the evidence introduced by the plaintiffs upon the *ex parte* trial in the Circuit Court it affirmatively appears that they had not complied with the statute of the State, which this Court says authorized the institution of this suit."

Plaintiff in error, being refused a rehearing, then sued out a writ of error to this Court, with the view of having the decision and judgment of the Supreme Court of the State reversed.

ASSIGNMENTS OF ERROR.

The assignment of errors set up by plaintiff in error are as follows:

"Now comes the above named appellant, and for the purpose of having the judgment of the Supreme Court of the State of Missouri reviewed upon writ of error from the Supreme Court of the United States, the said Missouri, Kansas and Texas Railway Company submits the following assignments of errors, to wit:

The Supreme Court of the State of Missouri erred—

I.

In holding and deciding that the State of Missouri was in effect a party to this cause.

II.

In holding and deciding that the State Court had authority or jurisdiction to investigate and inquire under the circumstances of this case whether or not the said State of Missouri was in effect the real party to this suit.

III.

In holding and deciding that the provisions of the statute of the State of Missouri for defraying the expenses incurred by the railroad commissioners in that suit rendered said State of Missouri liable for the costs of this case, so as to make it the real party in interest.

IV.

In holding and deciding that the possibility of the State of Missouri being entitled to recover a penalty under some contingency subsequent to or which might possibly arise on account of a violation of the judgment that might

be rendered in this case gives the State of Missouri such a monetary interest in the result of this case as to make it in effect the real party in interest.

V.

In holding and deciding that the case of Reagan *et al. v.* Farmers' Loan & Trust Company, 154 U. S., 362, was not conclusive of the questions presented in this case.

VI.

In holding and deciding that the laws of the State of Missouri authorized the proceeding commenced by the plaintiffs, Hickman, Cowgill and Flory against The Missouri, Kansas & Texas Railway Company in the Circuit Court of Cooper county, Missouri.

VII.

In holding and deciding that this case was not removable from the Circuit Court of Cooper county, Missouri, to the Circuit Court of the United States of the Central Division of the Western District of Missouri.

Wherefore, and because of the errors above specified, the said Missouri, Kansas & Texas Railway Company prays that the judgment of the Supreme Court of the State of Missouri may be reversed."

But one question confronts this Court for determination: Does the petition for removal to the district Court, together with the record in the case, show a sufficient diversity of citizenship to oust the State Court of its jurisdiction and confer full supervision thereof upon the Federal District Court. Plaintiff in error contends that such diversity of citizenship is presented. The contrary was held by the Circuit and Supreme Court of Missouri.

BRIEF.

1.

NO ERROR WAS COMMITTED BY THE SUPREME COURT OF MISSOURI IN HOLDING THAT THE CIRCUIT COURT OF COOPER COUNTY, AND NOT THE UNITED STATES DISTRICT COURT, HAD JURISDICTION OF THE CASE.

H. W. Hickman et al. vs. M., K. & T. Ry, 151 Mo. 648.

25 U. S. Statutes at Large, p. 434.

Powers vs. Chesapeake & Ohio Ry, 169 U. S. 92.

Yules vs. Vose, 99 U. S., 539-545.

Removal Cases, 100 U. S. 474.

2.

The United States District Court, as shown by the record, pleadings and motion to remove had no jurisdiction of the cause.

U. S. Statutes of Mch. 3rd, 1887, and August 13th, 1888.

State vs. S. C., 117 U. S. 431.

Amos vs. Kansas, 111 U. S. 449.

Alabama, to use of, vs. Wollfe, 18 Fed. Rep. 836.

State, to use of, vs. Oil Company, 85 Fed. Rep. 870.

State ex rel. vs. R. R., 85 Fed. Rep. 1.

Ferguson vs. Ross, 35 Fed. Rep. 161.

Governor of Ga. vs. Madrazo, 18 Pet. 110.

In re Ayres et al., 123 U. S. 443.

N. Y. vs. Southern, 117 U. S. 52.

Brown vs. Strode, 5 Cranch 303.

Maryland vs. Baldwin, 112 U. S. 490.

McNutt vs. Bland, 2 Howard 15.

3.

When the record, together with the petition for removal, fail to present a removable cause, the State Court will properly deny the application, and proceed with the trial.

Black's Dillon on Removal of Causes, Sec. 191.

Home Ins. Co. vs. Curtis, 32 Mich. 402.

Armory vs. Armory, 95 U. S. 186.

Kanouse vs. Martin, 14 Howard 23.

Mahowe vs. Manchester and Lawrence Ry. Co., 111 Mass. 72.

Bank vs. Dodge, 42 N. J. L. 316.

Carswell vs. Schley, 59 Ga. 17.

Dahlonega vs. Hall, 88 Ga. 339.

Ry. Co. vs. Risley, 50 Ind. 60.

Blair vs. West Point M'f'g. Co., 7 Neb. 146.

4.

Having once acquired jurisdiction the State Court should proceed until it is judicially informed that its power over the cause has been suspended.

Carswell, Ex'r, vs. Schley et al., 59 Ga. 17.

Albany Law Journal, Vol. 16, p. 392.

Black's Dillon on Removal of Causes, Sec. 191.

Gregory vs. Hartley, 113 U. S. 742.

National Docks Co. vs. R. R. Co., 52 N. J. Eq. 58.

Removal Causes, 100 U. S. 457.

5.

A State is not a citizen within the meaning of the Removal act of Congress.

State vs. Stone, 117 U. S. 43.

Amos vs. Kansas, 111 U. S., 449.

Ferguson vs. Ross, 35 Fed. Rep. 161.

Black's Dillon on Removal of Causes, Sec. 81.

Postal Telegraph Co. vs. Alabama, 155 U. S. 482.

Indiana vs. Toleston Club, 53 Fed. Rep. 18.

Minnesota vs. Trust and Safe Deposit Co., 73 Fed. Rep. 914.

Germania Ins. Co. vs. Wisconsin, 119 U. S. 473.

6.

Courts will look behind the nominal parties and examine the entire record to determine the real parties in interest. This is always true in passing upon the question of jurisdicton.

Ferguson vs. Ross, 35 Fed. Rep. 161.

Black's Dllon on Removal of Causes, Sec. 86.

Maryland vs. Baldwin, 112 U. S. 490.

7.

The State of Missouri is the real party plaintiff, the Commissioners being the nominal parties.

Ferguson vs. Ross, 35 Fed. Rep. 161.

Hickman et al. vs. M., K. & T. Ry., 151 Mo. 648.

8.

The State Court is at liberty to determine for itself whether on the face of the record a removal has been affected.

C. & O. R. R. Co. vs. White, 111 U. S. 134.

Railroad Co. vs. Koontz, 104 U. S. 5, 15.

Railroad Co. vs. Mississippi, 102 U. S. 135.

Stone vs. S. C., 117 U. S. 430.

9.

No Federal constitutional or Federal statutory question is shown by petition for removal to be involved in the controversy. Therefore, plaintiff in error must show its right to removal on account of diversity of citizenship of the parties.

U. S. Stat. of Mch. 3rd, 1887, and Aug. 13th, 1888.

10.

The State of Missouri is not undertaking to invoke the protection of the Eleventh Amendment to the Constitution of the United States; it is not being sued, but is itself the suitor. Therefore, the case of Reagan et al. vs. Farmers' Loan and Trust Co., 154 U. S. 362 is not in point.

In re Ayres, 123 U. S. 443.

Pennoyer vs. McConnaughy, 140 U. S. 1.

The State, however, does invoke the protection of what is known as the "removal act" of Congress, no provision being found therein authorizing a removal from the State Court to the Federal District Court where a State is a party to the proceeding sought to be removed.

11.

Even though it be held that the same construction should be given the statute in relation to the removal of causes from a State Court to the District Court, as has been placed upon the Eleventh Amendment to the Constitution of the United States, then we submit that the State of Missouri has such a pecuniary interest in the result of this litigation as to constitute it a real and substantial party hereto.

Revised Statutes of Missouri (1899), Sec. 1150.

Revised Statutes of Missouri (1899), Sec. 1151.

Revised Statutes of Missouri (1899), Sec. 1155.

12.

When it appears that the State Court has construed its own constitution and statutes applicable to the case, the Federal Court is bound by the decision of the State Court in regard to the meaning of the constitution and laws of its own state, and its decision upon such a state of facts will be followed by the Federal Courts. This is true in all cases where the writ of error is to a State Court.

Turner vs. Wilkes County Com., 173 U. S. 461.

The State Supreme Court in the case at bar, held that, under the Constitution and laws of Missouri, the State is the real and material party to the proceeding and as such is pecuniarily interested in the result.

It having been determined by the State Court that under the statutes of Missouri the State has a pecuniary interest in the subject matter of the controversy, the Federal Courts will adopt the same as conclusive, and not undertake to overturn it.

Gormerly vs. Clark, 134 U. S. 338.

Powell vs. Brunswick, 150 U. S. 442.

Turner vs. Wilkes County, 173 U. S. 461.

Lowell vs. Walker, 14 How. 107.

13.

Under the "removal act" of Congress it is not necessary that the State should have a pecuniary interest in the result of the case in order to constitute it a party to the proceeding and prevent a removal from the State Court. A "governmental interest" is sufficient.

14.

The State, in the exercise of its sovereign power, has certain duties to perform toward its people, which duties are solely governmental. In the enforcement of the rights of the people the State alone, in many cases, can act. The right of citizens being merged, one with another, constitute the sovereign power of the people or State, and as such can only proceed in the name of the State.

Railroad Co. vs. Greenwich, 25 N. J. Eq. 566.

Allen vs. Board, 13 N. J. Eq. 68.

Higbee vs. R. R. Co., 19 N .J. E. 276.

Houck vs. Wachter, 34 Md. 265.

II.

THE STATE IS CLOTHED WITH SUPERVISORY OR VISITORIAL POWER OVER CORPORATIONS DOING BUSINESS WITHIN ITS JURISDICTION. IN THE EXERCISE OF SUCH AUTHORITY IT ACTS IN ITS SOVEREIGN CAPACITY, AND NOT FOR THE SPECIAL BENEFIT OF ANY ONE INDIVIDUAL, AND AS SUCH IT IS A PARTY.

The supervisory or visitorial power over corporations in this country is lodged in the State and may be exercised

in such manner as may be designated by legislative authority. Generally, it is exercised through the medium of the Courts and public officers or persons authorized or appointed by legislative sanction.

2 Kent's Com., 300.

Lewis ys. Whettle, 77 Va. 415.

Elliot on Railroads, Vol. I, Sec. 1-2.

Thompson on Corporations, Vol. 4, Sec. 5473.

Thompson on Corporations, Vol. 4, Sec. 5474.

Beach on Corporations, Vol. II, Sec. 831-2.

Thompson on Corp., Vol. I, Sec. 908.

2.

The visitorial or superintending power of the State over corporations will always be exercised through the medium of courts, by writs of mandamus, quo warranto or prohibition, as the exigencies of the case may require.

State ex rel. vs. Milwaukee C. C., 47 Wis. 680.

Beach on Corp., Vol. II, Sec. 831-832.

Thompson on Corp., Vol. 4, Sec. 5474.

The mode of procedure may be changed and regulated by law as may be deemed advisable, so that any proceeding may be adopted that will be conducive to the remedy sought to be obtained or the evil abated, and the State is clothed with ample power to use its governmental functions in the enforcement of such rights as affect the general public. More especially is this true when dealing with *quasi* public corporations; such as railroad companies.

3.

Railroad companies are given certain perogative franchises and privileges for public purposes, in return for

which the State retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or *quasi* public trust.

Messenger vs. R. R. Co., 36 N. J. L. 407.

Elliott on Railroads, Vol. I, Secs. 1-2.

The legislature of Missouri has colthed the Railroad Commissioners with authority to supervise the business and general demeanor of all railroad companies doing business in the State. They are the State's representatives in that respect and act for the State under Statute. They have no personal interest in the result of this case, except what is common to all persons alike. The sovereignty of the State is being exerted. In other words, all the people of the State are parties in interest, which can mean but one thing, and that is, the State is the party in interest.

In this matter the State has a legal entity, separate and apart from the persons composing it. This is true in all cases where the State acts in sovereign authority. So far as constituting a party to a legal proceeding is concerned we are not required to go beyond the legal entity, for, as such, it is a proper party when properly authorized. Very much like private corporations, which on account of their legal entity act under a corporate name independent of the persons composing it. While each stockholder in a corporation is pecuniarily or otherwise interested, yet such interest is not taken into account when passing upon questions affecting the corporation, as such. The legal entity alone controls as to whether the corporation is a proper party. This is also true in determining the question of jurisdiction when a corporation is a party.

Tippecanoe vs. Lafayette Ry. Co., 50 Ind. 85.

Futsam vs. Hay, 122 Ill. 293.

Muller vs. Dows, 94 U. S. 444.

Gelpcke vs. Blake, 19 Iowa 263.

III.

RAILROAD COMPANIES ARE QUASI PUBLIC CORPORATIONS, AND AS SUCH ARE SUBJECT TO GENERAL SUPERVISION BY THE STATE. IN ALL SUITS TO ENFORCE THIS VISITORIAL POWER THE STATE IS A PARTY.

Railroads, like telegraph, telephone and turnpike companies, are quasi public servants. The nature of their business makes them so, and they are therefore bound to serve the public on reasonable terms, with impartiality. They are endowed with the right to appropriate private property upon the sole ground that they are quasi public servants, their business being that in which the public has a direct and positive interest.

Com. vs. Lowell Gas Co., 12 Allen 75.

Olcott vs. Fonder Lac Co., 16 Wall. 678.

Charles River Bridge vs. Warren, 11 Pet. 419.

Worchester vs. R. R. Co., 4 Met. 564.

Mayer vs. Philadelphia, 21 Pa. St., 147.

Gibson vs. Mason, 5 Nevada 283.

National Docks R. Co. vs. R. R. Co., 32 N. J. Eq., 755.

2.

While the ownership of a railroad may be in private individuals, yet the use is public, in which the public have an easement similar to that possessed in public highways.

Worchester vs. Western R'y Co., 4 Met. 564.

Com. vs. Wilkinson, 16 Pick. 175.

Gibson vs. Mason, 5 Nev. 283.

3.

Under the Constitution of Missouri all railways constructed or to be constructed are denominated as and declared to be "public highways," thereby bringing them clearly within the control and supervision of the State in the exercise of its sovereign power.

Constitution of Mo., Art. 12, Sec. 14.

Under the foregoing circumstances it will be seen that the State in its own name, in the exercise of a soverign power, through the instrumentality of its proper officer, has the right to institute proceedings to compel a proper observance of all conditions and requirements, public in character, fixed or imposed by it upon corporations of a quasi public character and in which all people have a mutual or general interest.

This principle is recognized in the statutes under which this suit was instituted. It is there provided that "in case the Court shall find the order of the commissioners to be not a lawful order, said Court shall, without any reference to the regularity of the proceedings of said board or of the order thereof, proceed to make such order as the board should have made, and to enforce the same by proper process."

Sec. 1150 R. S. Mo. 1899.

4.

The Legislature of Missouri, in the above enactment, intended to and did follow the spirit of the common law in relation to the supervisory and visitorial power of the State and the Courts thereof over its quasi public corporations.

IV.

NOTHING BUT THE RIGHT TO REMOVE THE CASE TO THE DISTRICT COURT WILL BE CONSIDERED.

A writ of error to a State Court brings before the Supreme Court of the United States nothing but the federal questions involved and raised by plaintiff in error while the case was pending in the State Court. Therefore the only question now before this Court is, did the State Court commit error in rejecting the petition for removal and in refusing to surrender jurisdiction of the cause.

Waters vs. Mercer, 8 Peters 88.

Barbier vs. Connolly, 113 U. S. 27.

Ashley vs. Ryan, 153 U. S. 436.

ARGUMENT.

I.

THE STATE COURT COMMITTED NO ERROR IN RETAINING COGNIZANCE OF THE CASE AND PROCEEDING TO FINAL JUDGMENT.

This suit was filed and commenced in the Circuit Court of Cooper county, Missouri, at the October term, 1895. At said term, the plaintiff in error without answering, presented a petition for the removal of the cause to the Circuit Court of the United States for the Central Division of the Western District of Missouri.

The petition for removal was by the Court overruled, and after several continuances, the cause was duly tried, which resulted in judgment for plaintiffs; to reverse which, plaintiff in error appealed to the Supreme Court of the State but that court found against it, affirming the judgment on the sole ground that the case was not removable. Plaintiff in error then sued out this writ of error.

Plaintiff in error contends that as soon as the petition for a removal to the Circuit Court of the United States was filed, the State court was divested of all jurisdiction.

Our position is, that the State Court was not ousted of its jurisdiction by reason of the filing of the application and petition for a removal, and resting upon the action of said Court in overruling defendant's request the case has been prosecuted to final judgment in the State court.

The Federal statute authorizing a removal from a state court to a United States district court provides, that: "in

a suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaty made, or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

"Any other suit of a civil nature, at law or in equity, in which the circuit courts of the United States are given jurisdiction by the preceding section and which are now pending or may hereafter be brought in any of the state courts, may be removed into the circut court of the United States for the proper district, by the defendant or the defendants therein being non-residents of that state.

"And when in any suit mentioned in this section there shall be a controversy between citizens of different states and which cannot properly be determined as between themselves, then either one or more of the defendants actually interested in said controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending or may hereafter be brought in any state court in which there is a controversy between citizens of the state in which the suit is brought and the citizens of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in said state court, or in any other state court, to which defendant may, under the laws of the state, have the right on account of such prejudice or local influence to remove said cause."

The section immediately preceding the foregoing provisions, provides that: "The circuit court of the United States shall have judicial cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the constitution or laws of the United States, or treaty made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming land under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them."

This act of Congress was passed August 13, 1888, in amendment of the act approved March 3, 1887, which was also an act amending a provision of an act of Congress approved March 3, 1875, and under which practice, cases of this kind have been governed.

Now, upon a comparison of the law of 1888 with the statute as it existed prior thereto, it will be found that the present law is more restrictive in its application than the former, and that in no case is it provided that a removal from a state court to a district court shall be had where the controversy pending is between citizens of a foreign state and a state itself. In other words, it has been held that there is "no citizenship in a state," and for that reason

the law above referred to does not apply, and consequently no right to remove exists.

The application for removal in the case at bar was based altogether on diversity of citizenship. Plaintiff in error did not undertake to set up the fact that there was a Federal, constitutional or statutory, question involved; we must, therefore, confine ourselves to the proposition as to whether there is a diversity of citizenship in the controversy.

Plaintiff in error is a corporation organized under the laws of the state of Kansas, and, therefore, under the decisions of this court is a non-resident of the State of Missouri, while defendants in error occupy an official position under the laws of Missouri and in such official capacity instituted this proceeding. It was instituted by them under express direction of State authorty in the exercise of that supreme power which all states possess in the control of its corporations, or corporations authorized to do business therein. The Railroad Commissioners and the Attorney-General, who instituted the proceeding are the representatives, or the hands, of the State. It is purely a proceeding on the part of, and by the State. This Court has previously held that "a state cannot, in the nature of things, be a citizen of any state."

In the case of State vs. South Carolina, 117 U. S. 143, the application for removal alleged that the petitioner was at the time the action was commenced a citizen of the state of New York, and the respondent therein; that plaintiff was a citizen of the state of South Carolina. The Court, in passing upon the question, said: "It only remains to consider whether on the face of this record it appears that the suit was removed from the state court by the presentation of the petition of Stone, and about that little need be said. It is not pretended that the suit was one arising under the constitution or laws of the United States. The state of South

Carolina is the sole plaintiff, and the defendants are citizens, one of South Carolina and the other of New York. The cause of action is joint and only one of the defendants petitions for removal. There is no statute which authorizes the removal of a suit between a state and citizens on the ground of citizenship, for a state cannot, in the nature of things, be a citizen of any state."

This same point was decided in the case of Amos vs. Kansas, 111 U. S. 449, and there held as above stated, with the exception that the plaintiff's petition and application for removal showed upon its face that the subject matter involved was based upon the constitution and laws of the United States, and that the removal was asked for on that ground, and not because of the citizenship of the parties.

A suit instituted by a state in one of its own courts against a citizen of another state is not removable on the ground of diversity of citizenship of the parties.

State of Ala. to the use of the county of Montgomery vs. Wollfe, 18 Federal Reporter, 836.

In the case of the state of Indiana vs. Towelston Club of Chicago, 53 Federal Reporter, 18, the Court said: "In the case at bar this Court has no jurisdiction except on the ground of diverse citizenship. Whether such diverse citizenship exists hinges on the question, Is the state of Indiana a citizen of the state of Indiana, within the meaning of the removal act, for the purpose of giving this Court juridsiction? This question must be answered in the negative. A suit instituted by a state in one of its own courts against a citizen of another state is not removable into the circuit court of the United States on the ground of diversity of citizenship of the parties.

When a state brings suit in a court of its own creation against a citizen of another state, no removal can be had

into the circuit court of the United States, on the ground of diverse citizenship of the parties."

This was also held in the case of state of Indiana to the use of Delaware county vs. Alleghany Oil Company et al., 85 Federal Reporter, 870. The Court there said that: "A state is not a citizen of any state, and under the judiciary acts of the United States it is firmly settled that a suit between a state and a citizen or corporation of another state is not between citizens of different states; and the circuit courts of the United States have no jurisdiction of it unless it arises under the constitution, laws or treaty of the United States."

In the case of Germania Insurance Company vs. Wisconsin, 119 U. S. 473, it was likewise held that a suit by a state in one of its own courts cannot be removed to the Federal courts unless it be a suit arising under the constitution or laws of the United States, or treaty made, under their authority.

We cannot escape the correctness of the proposition that the present proceedings is one in which the State of Missouri is party plaintiff. While it appears upon the face of the petition not to have been brought directly in the name of the State of Missouri, yet it does appear to have been brought in the name of the persons who represent the State, and who constitute and compose the State Board of Railroad and Warehouse Commissioners. We, therefore, conclude that the State of Missouri is the real party in interest. It has been held that courts will look beyond the parties appearing of record to determine the real party in interest, and if it be discovered that other parties are the ones materially and ultimately interested they will be looked upon as the parties to the suit in passing upon the question of jurisdiction and other interests involved.

In the case of Ferguson vs. Ross, 35 Federal Reporter,

161, an action was brought under the laws of New York in the name of Ferguson as "Shore Inspector," to recover the penalty imposed for depositing prohibited materials in the water of the bay and harbor of New York, which penalty, when recovered, was to be turned into the state treasury; it was held to be in effect an action by the state, and for that reason not removable on the ground of diversity of citizenship under the act of Congress of March 3, 1887, of which the act of 1888 is amendatory thereto.

In that case the Court said: "There is no pretense that the matter in dispute arose under the constitution or laws of the United States, it is not a controversy between citizens of the different states that the plaintiff insists that this Court has power to dispose of it, and on that authority he seeks to sustain the removal. There is not statute which authorizes the removal of a suit between a state and citizens of another state on the ground of citizenship, for a state cannot, in the nature of things, be a citizen of any state. The nominal plaintiff here is an individual. But he sues in his official capacity; the suit is brought to enforce the police regulations of the state. He has no personal interest in its subject matter, or even for his fees or commission for he is a salaried officed whose compensation is secured irrespective of the result of the suit he may bring. In the event of his removal from office the suit will be continued by his successor, and not by himself. Courts will look beyond and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether the state is the real party to the action brought by or against its officer by a consideration of the nature of the case as presented by the whole record."

The above case is parallel to the case at bar. This suit was instituted by W. H. Hickman, et al., in 1895, while Hickman was a member of the Board of Railroad and Warehouse Commissioners of the State of Missouri; it was in-

stituted in the official capacity of said officers and by virte of the laws of the State governing their office. They had no financial or personal interests in it, but were merely carrying out the provisions of the law enjoined upon them. Neither were their salaries dependent upon this litigation, they being provided for as salaried officers in another manner. In other words, they were only the nominal parties to the suit, the State of Missouri being the real party.

The fact that the case was instituted in the name of the Railroad and Warehouse Commissioners, in their official capacity, and under specific statutory direction, leaves no occasion for doubt as to the real party in interest.

This court has frequently announced that it would look through the nominal parties plaintiff with a view to determining the real party. The proposition is too well settled to solicit discussion here.

As to whether the state is the real party in interest, plaintiff in error calls our attention to the case of Reagan vs. Farmers' Loan and Trust Company, 154 U. S. 362. That case is not in point. The issue there raised grew out of the proper application to be given the eleventh amendment to the constitution of the United States, while in the case at bar we are dealing with the "removal act" of Congress and the proper construction to be given it. In that case it was held that in order to prevent suit against the state, or the officers thereof, as provided by the constitutional amendment, the state must have some pecuniary interest in the litigation or its result. While no such interest could possibly exist in that case, yet in this matter the state is shown to have a pecuniary interest and to that extent is directly affected by the suit.

In this connection the Supreme Court of Missouri, in its consideration of this case, speaking through Brace, J., said: "Although the State of Missouri is not a nominal party to the suit, yet if it is the real party in interest the

controversy is between the State and the defendant, and the Federal Statute does not apply, and the question whether the State is the actual party to the controversy must be determined by a consideration of the whole record. *In re* Ayres, 123 U. S. 443; Carson v. Hyatt, 118 U. S. 279; Hagood v. Southern, 117 U. S. 52; Maryland v. Baldwin, 112 U. S. 490. The law looks to "things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law." McNutt v. Bland, 2 How. 9.

"The positive law authorizing this action is section 2653, R. S. 1889, the provisions of which bearing upon the present inquiry are as follows: 'Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employe thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any Circuit Court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the Court shall deem reasonable * * * * and if it be made to appear to the Court on such hearing * * * that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or require-

ment of said commissioners, and enjoin obedience to the same * * * And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such Court to issue writs of attachment, or other proper process of said Court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers or agents, of the same, against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said Court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. * * * Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general, when requested by said commissioners, to prosecute the same. * * * The costs of such proceedings may be, with the approval of the attorney-general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid in the first instance out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision

is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case.'

"By section 2658 it is further provided that 'to defray the necessary expense of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the State treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the State auditor, issued upon the requisition of the railroad commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid.'

"The general rule is that 'when the plaintiff has no real interest in the subject-matter of the controversy, and can derive no advantage from the judgment; but the suit is required to be brought in his name because he holds the formal right to sue, although the action is really prosecuted for the benefit of another, the record plaintiff is only a nominal party, whose citizenship will not affect the right of removal; such right will depend upon the relative citizenship of the real party in interest."

Black's Dillon on Removal of Causes, § 86.

"Under this Statute the suit is brought in the name of the 'Board of Railroad Commissioners," because they hold the formal right to sue, but the members of that board, neither individually or collectively, have any interest in the subject-matter of the controversy, and can derive no advantage or benefit nor suffer any injury or loss from the judgment therein. In Ferguson v. Ross, 38 Fed. Rep. 161, holding that an action under the laws of New York, in the name of 'the Shore Inspector," to recover a penalty for depositing prohibited material in the waters of the bay and har-

bor of New York, which penalty when recovered goes into the State treasury, is in effect an action by the State, and therefore not removable under the act of Congress in question, it was said: 'The nominal plaintiff here is an individual, but he sues only in his official character. The suit is brought to enforce a police regulation of the State. He has no personal interest in its subject-matter, not even for his fees or commission, for he is a salaried officer, whose compensation is secured, irrespective of the result of the suits he may bring. In the event of his removal from office the suit would be continued by his successor, not by himself. Courts will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether a State is the real party to an action brought by or against its officer by a consideration of the whole record' (citing authorities). 'The real party prosecuting these suits is the State of New York, and they are therefore not removable under the act of 1887.' On the other hand, in Regan vs. Farmers' Loan & Trust Co., 154 U. S. 362, holding that a suit in equity against the railroad commissioners of the State of Texas, assented to by that State in the act creating the commission, was not a suit against the State, it was said: 'So far from the State being the only real party in interest and uopn whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense.

"It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws, but such govern-

mental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced; none of its property affected by any decree which may be rendered.' While neither of these cases, upon the facts in judgment, for obvious reasons, can be regarded as direct authority in the present case, an analogue of which cannot perhaps be found in the reports, much reliance is placed upon the reasoning in each by counsel respectively, the attorney-general contending that the case in hand is within the reasoning of the first, and counsel for defendant that it is within the reasoning of the last. So these cases may serve, if not for authority, at least as pointers to a proper solution of the question of 'real interest' under the statute.

"The State, in its governmental capacity, having, in previous sections of the statute, made provision for regulating the rate and charges of common carriers for carrying passengers and freight, and provided for a hearing before its board of commissioners of all complaints for a violation of those regulations, and that the finding of the board shall be *prima facie* evidence of the reasonableness and justness of the charge by it found and required. This section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons: First, 'the board of railroad commissioners;' second, 'any person or company interested in such order or requirement.' Now, while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid

under the express provision of the satute out of any money in the treasury not otherwise appropriated, and is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgment which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the State treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental has a real pecuniary interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense and is not subject to removal to the United States Court, and we so hold."

The above position of the Supreme Court of Missouri is unassailable. No other reasonable course could be followed. Besides, having no pecuniary interest themselves in the result of the case, the Railroad Commissioners could not have instituted the proceeding save in their official capacity, and as the representatives of the State. Not only is the State pecuniarily interested under the statutes referred to by the Court in its opinion; it is also pecuniarily interested in the official demeanor of the Commissioners in that it appropriates funds to pay their salaries, and their contingent expenses in the excise of their visitorial power over the railroads of the State, conferred upon them by legislative authority. Therefore, even though it be held that the act of Congress authorizing the removal of cases from a State court to the United States District Court should be given the same strict construction as has been placed upon the eleventh amendment to the Constitution of the United States, by requiring the State to have some pecuniary interest in the cause, plaintiff in error cannot complain be-

cause such interest is shown to exist in and accrue to the State.

However, it matters not what may be the opinion of plaintiff in error in this respect, there is now no competent ground for argument upon this proposition, as Federal Courts follow the decision of the State Courts in regard to the meaning of the Constitution and laws of the respective States. This is true in all cases where the writ of error is to a State Court. The Supreme Court of Missouri having held that under the laws of Missouri the State is a real and material party to the proceeding and as such is pecuniarily interested in its result, this Court will adopt the same as conclusive, and not undertake to overturn it.

II.

THE STATE IS CLOTHED WITH SUPERVISORY OR VISITORIAL POWER OVER ITS CORPORATIONS. IN THE EXERCISE OF SUCH AUTHORITY IT ACTS IN ITS SOVEREIGN CAPACITY, AS A LEGAL ENTITY, FOR THE BENEFIT OF THE PUBLIC AND NOT ESPECIALLY FOR ANY ONE INDIVIDUAL. IT IS A PARTY.

Aside from what has heretofore been said on the question involved in this case we call the Court's attention specifically to the provisions of the "Removal Act" of Congress. There is nothing in the act which specifies the character of interest which the State shall have in the result of the cause in order to make it a party to the proceeding and thereby place a direct inhibition on its removal. The fact is, the statute does not contain one word about the right to remove a case when a State is a party, and for that reason Courts have invariably refused to remove causes where a State was a party. There would be no sound reason in holding that in order to prevent a removal the State must have some

financial or pecuniary interest in the case. The interest may be governmental in a strict sense, yet if it be such as accrue to the public in general, and the State, in the exercise of its sovereign power and duty undertakes to enforce such public right or interest, it would be the real party in interest; because it is a political entity.

It is a well settled principle in this country that a State can maintain an action where the injury to be redressed is one of public concern, affecting public interests. We are not to be understood as maintaining that where mere private rights have been infringed or where wrongs have been done the private citizen, with no special injustice to the public at large, that the State could interfere. In a case of that character the State would not be the proper party to an action in redress of the wrong. Nor do we contend that an action cannot be removed from the State to the Dictrict Court when it is clear that it was brought by and in the name of the State at the relation or instance, or for the special benefit of some particular individual under a statute authorizing that character of proceeding. In those cases, Courts will, as it has done in this, look beyond the nominal party of record to discover the real party in interest. But when it is found that the suit was instituted for and in the interest of the public in general, the State is none the less the real party, though the proceedings be purely of a governmental character, and instituted by and in the name of the officer properly empowered by law.

The State is as much in duty obliged to protect its people from public wrongs, evils which affect all persons alike, as it is to properly guard and preserve its own property.

We are told that "a State is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength." Vattel's Law of Nations, Book 1, Chapter 1, Section 1. As a political corporation, it has the

right to institute suit, whether it be required by its pecuniary interest or the general public welfare, and, for this purpose the courts of the land are open to it.

Atty.-General vs. Albion, 52 Wis. 469.

Atty.-General vs. Ry Companies, 35 Wis. 425.

State vs. Loan & Trust Co., 81 Texas 530.

People vs. Beaudry, 91 Cal. 213.

The foregoing decisions are here referred to for the purpose of showing that the State can be a suitor in all cases for the enforcement of rights and redress of injuries which affect the public. When such right is conceded to the State, it necessarily becomes a party, and this is true whether the suit be instituted directly in the name of the State or at the instance and in the name of the Attorney-General or other properly authorized officer. In such case the remedy may be obtained by any effective proceeding, either at common law or such as may be provided by statute. The essential thing to be determined is the right of the State to act, when that has been settled in the affirmative, the State is of necessity a party to the proceedings.

While the right to seek relief, from injuries of a public character, by a private individual, where there is a real and substantial injury suffered by him, has always been recognized in this country; yet it is also true that the State, by proper proceeding therefor, may abate the injury or wrong on grounds of public concern, for in such cases the public wrong is constituted by the aggregation of private wrongs. Attorney-General vs. Railroad Companies, 35 Wis. 425.

This principle is recognized by the provisions of the Statutes of Missouri, as referred to by Brace, J., in his opinion in this case. It is thereby provided that any person injured by the wrongful act of the railroad company on account of violating the orders of the Commissioners may sue

for redress, while the Commissioners, also, shall act as therein directed, to protect the public. In the first instance it is the act of the individual citizen, in the second, it is the act of the State.

III.

AS TO RAILROAD COMPANIES, AND ALL QUASI PUBLIC CORPORATIONS, THE RIGHT OF THE STATE TO VISIT AND SUPERVISE CANNOT FROM ANY STANDPOINT BE QUESTIONED, AND WHEN EXERCISING SUCH DUTY TOWARDS THE PUBLIC THE STATE IS THE REAL PARTY IN INTEREST. IT ACTS THROUGH ITS SOVEREIGN POWER AND IN THE NAME OF ITS POLITICAL OR CORPORATE ENTITY.

While the State has the right to correct all evils and abuses of a public nature, induced or caused by corporations, or from any source whatever, the right more particularly applies in case of evils induced and brought about by quasi public corporations, such as railroads, turnpikes, telephones and telegraphs.

Railroad companies are not mere common carriers, in the general acceptation of the term. They are confined to fixed routes and to current rates or fixed compensation; they must have all the means necessary for the business of the public; they cannot suspend or abandon business at pleasure; and must not discriminate in charges and tolls. Such a carrier is the creation of law, and it cannot exist without legislative will. It owes its existence to an express authority granted by the State for public welfare. Its business is not a private enterprise, but public, and for public use. The capital invested therein may be for private gain, and may distinguish such corporations from municipal or purely public ones, and for this reason alone they may be called private corporations; but they are never considered

such when reference is made to their purpose or object, for private gain does not even form a part of the consideration that moves the State in their creation.

In speaking of the visitorial power of the State over corporations, on account of the grant of corporate existence, it has been said that, "every corporate grant by the State necessarily implies the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created."

Chicago Ins. Co. vs. Needles, 113 U. S. 574.

Mr. Thompson in his work on corporations, Vol. 1, Sec. 908, says: "Every corporation of the State, whether public or private, civil or municipal, is subject to its superintending control, although in its exercise, different rules may be applied to different classes of corporations."

Beach, private corporations, Vol. 2, Sec. 832, says: "There are other grounds upon which the State assumes peculiar control over certain kinds of corporations, to-wit: that they were created to be governmental agents; that they are employed and partake in the conduct of public affairs; that they have control of funds belonging to the State or Federal government; *or that they conduct a business in which the public has an interest*, extraordinary powers and exclusive privilegs having been granted them for these purposes."

The visitation of railroads in this country is generally vested in a Board of Railroad Commissioners, who are invested with general supervision of all such roads and are authorized to inquire into any neglect of their public duties or violation of State laws.

Being specially authorized to engage in a public business, and having been granted the power of eminent domain, and other powers not enjoyed by private individuals, it is absolutely necessary that the State exercise its sovereign power of supervision over them. To say, that, the State on account of the public nature of the business should grant these special privileges, and by such means afford the public proper transportation facilities, naturally includes or admits the right, as well as the duty, of the State to protect the public against an unreasonable use of the rights enjoyed by such companies. This brings us down to the proposition as to whether the State, as such, can in its own name enforce proper and adequate freight and passenger tariff schedules. We take it that it is settled that the State may fix such rates, so long as they do not work a confiscation of the property of the company. Then, from the proposition that such rates are established by the State in the exercise of its supreme power over quasi public corporations, for the benefit of the public in whose interest the corporation is primarily authorized to do business in the State, we conclude the State should be as equally diligent in the enforcement of such rates and to that end may exercise its sovereign power through and in the name of its political "corporate entity." Its right to institute proceedings therefor must be admitted, and that it is the real party to the proceedings cannot be disputed.

The Constitution of Missouri clearly authorizes proceedings of this character. It declares that all railroads heretofore, or that may hereafter be, constructed are public highways, and railroad companies common carriers. Sec. 14, Art. 12 of Constitution of Missouri. The same section of the Constitution requires the General Assembly of the State to pass laws to correct abuses and prevent unjust discrimination and exhortation in the rates of passenger and freight tariffs on the various roads in the State; and

also provides that from time to time laws shall be passed establishing reasonable maximum rates of charges for the transportation of passengers and freight on said roads.

In harmony with the foregoing Constitutional requirements the Legislature of Missouri, created the Board of Railroad and Warehouse Commissioners and invested them with visitorial power over all railroads doing business in the State. What they do in this respect, is the act of the State in the exercise of an admitted right. The State must, therefore, according to all known rules of pleading and practice, be the party plaintiff to suits instituted by the Commissioners under the Constitution and laws of Misouri.

The fact that the statute gives a right of action to the injured citizen, outside of, and separate from, the suit required to be instituted by the Commissioners is sufficient to satisfy us that it was the intention of the Legislature to make the State a party to any proceeding instituted on behalf of the Commissioners. The one remedy being for the injured individual, and the other for the benefit and relief of the injured public. If the State be not a party, why did not the Legislature stop as soon as it had provided a remedy for the injured private citizen?

The fact is, the law-making power recognized that railroad corporations owing their existence to the sovereign grant of franchises and powers, granted on the sole grounds of public use and in the interest of the commercial and business industries of the State, the State has a paramount right over them to secure such public use and the proper administration of such franchises and powers; and that in case of an abuse of such powers and franchises, the State should not await the tardy, expensive and inadequate litigation of private parties seeking redress in a multiplicity of suits, but should itself take immediate steps to correct and abate the wrong inflicted upon its people.

We have discussed the right of the State to clothe

itself with sufficient power to enforce the conditions imposed upon quasi public corporations doing business within its jurisdiction, and to exercise visitorial powers thereover, in all matters affecting public interests, for the sole purpose of showing that in such cases the State acts for itself, in its own name, as a political corporate entity, as a sovereign power, the same as though it were a private corporation, serving the interests of its stockholders by a due regard for its own rights and interests.

While we do not question the justice of the decision of this Court where it is held that in case the suit is instituted in the name of the State for the use and benefit of some private citizen under a special statute authorizing the same, the courts will look through the record and proceed as though it be instituted directly in the name of such party, yet the rule there followed cannot be applied to that class of cases instituted by the State, or by some officer of the State in accordance with express statutory or common law power, where the interests of the public and not of a few certain designated persons, are to be advanced.

We are not unmindful of the fact that the United States District Court held in this case, that the State is not the real party in interest. The Court's reasons therefore are based entirely upon the ruling of this Court in the case of Reagan vs. Loan & Trust Co., 154 U. S. 362, but as heretofore stated that case embraced a consideration of the eleventh amendment to the Constitution of the United States and not, as here, a construction of the "Removal Act" of Congress.

The fallacy of the argument advanced by Judge Phillips is readily seen, when he says the "shippers and travelers" are the "interested persons." Let the question be asked directly and pointedly by the Court: Who is the real party in interest? The only answer possible is the traveling and shipping public. It may be "A" today and "B" tomorroy, or

"A" and "B" today and "C" and "D" tomorrow. Perhaps it will be "A" in Boonville today and "B" in St. Louis tomorrow. No special person can with certainty be named, but by associating all persons together under a common head a proper and competent answer is acquired. "The public," represented as, and by, the "State." This same principle is true in all matters of public wrong.

IV.

WHEN THE RECORD, TOGETHER WITH THE PETITION FOR REMOVAL, FAILS TO PRESENT A REMOVABLE CAUSE, THE STATE COURT WILL PROPERLY DENY THE APPLICATION AND PROCEED WITH THE TRIAL.

While the case was pending in the Supreme Court of the State, plaintiff in error contended that the State Court was without jurisdiction, for the reason that when the petition for removal was filed, the State Court had nothing to do except make an order transferring the case to the district Court. It is true that where the record, together with the petition for removal, shows upon its face a removable case, the jurisdiction of the State Court upon the reception of the petition for removal is at an end, and should not proceed further. This ruling, however, aplies only to cases where the aplication is properly made, for if the Federal Court cannot acquire jurisdiction of the case, it cannot be lost to the State Court.

It is well settled that in cases where Federal Courts do not acquire jurisdiction, they will be remanded to the State Court by the Court itself, even though no steps be taken in that respect by the attorneys.

The foregoing principle is drawn from a proper consideration of the Act of Congress of March 3rd, 1887, which provides that "whenever any party entitled to remove a suit mentioned in the next preceding section * * *

* * * * * * * * * * it shall then be the duty of the State Court to accept such petition and bond and proceed no further in such suit." But it will be observed that before the party is entitled to a removal and before the State Court loses jurisdiction, the petition for removal and the record in the case must show that it is subject to removal, under the Federal Statutes.

It is not our contention that if the plaintiff in error was entitled to a removal and made proper application therefor, that other pleadings could be filed in the State Court and proceedings had thereon, for the very reason that if the case was properly removable, the State Court lost its jurisdiction the moment the petition for such removal was filed. The point made by us, is, that at the time the petition for removal was presented to the State Court, it appeared from the petition and the record in the case that plaintiff in error was not entitled to a removal. This was not a question of fact to be determined, but clearly a proposition of law and the records of the State Court show beyond question that no error was committed by the State Court in refusing the petition, and continuing in its jurisdiction over the cause. This principle arises out of the well-known fact that a case cannot be properly pending in two Courts at the same time, with full jurisdiction in each.

In Black's Dillon on Removal of Causes, section 192, we find this language: "When an application for the removal of a cause from a State Court to the Federal District Court, is duly and seasonably made, by filing a proper and sufficient petition and bond, and the removal papers, in connection with the record, show that the case is within the Act of Congress, it is the duty of the State Court, under the Statute, to accept said petition and bond and proceed no further in said suit. All rightful jurisdiction of the State Court over the case immediately ceases and it makes no difference whether that Court grants or refuses an order

of removal. Its jurisdiction being at an end, any further steps in the case in that Court, or any order, judgment or decree made by it is erroneous and voidable, if not absolutely void."

But when it appears from the record in the case that the State is a party plaintiff, the Federal Court can have no jurisdiction on removal from the State Court on the ground of diverse citizenship between individuals or corporations and the State, whether they be citizens of the same or different states, this arising from the very nature of things that a State cannot be a citizen of a State, and such controversy cannot in any just sense be said to be between citizens of different States.

Tennessee vs. Bank, 152 U. S. 455.

Sturgeon vs. Lumber Company, 89 Fed. Rep. 113.

Railroad Company vs. Texas, 170 U. S. 226.

The right to remove a cause from the State Court to the Federal Court is wholly statutory, and before the plaintiff in error could avail itself of this right, it should have been shown upon the records of the State Court that its case comes within the provisions of the Statute. Any material omission will be fatal to such removal. It may not be out of place to here notice that if the citizenship of the parties is not such as bring the case within the category of removable causes no agreement or stipulation between them will invest the District Court with jurisdiction.

Then if it be impossible for the parties to stipulate a removal of the case, or agree that the same shall be removed in any manner, or if the District Court cannot be vested with jurisdiction, the State Court will be deemed to have remained in jurisdiction, and any action taken by it in pursuance of the laws of the State towards a final judgment will be valid.

The State Court is not bound to surrender its jurisdiction of the suit on a petition for removal until a case is made out, which, on its face, shows that the petitioner has a right to its transfer. The mere filing of a petition for a removal of the suit, which is not removable, does not work a transfer.

The Supreme Court of the United States has in many cases recognized the principle that a State Court is not required to release its jurisdiction, until a case is made out that shows upon its face that the petitioner can remove the case as a matter of right. In such cases, the question always presents itself to the State Court as to whether, admitting the facts to be as they appear in the record and alleged in the petition for removal, the petitioner has brought himself within the Act of Congress. These questions the State Court always has authority to and must determine.

In the case of Gregory vs. Hartley, 113 U. S., loc. cit., 742, a writ of error to reverse the judgment of the Supreme Court of Nebraska was sued out on the single ground that the State Court had proceeded with the suit and refused to release jurisdiction thereover after petition for removal to the Circuit Court of the United States had been filed.

The Court said: "To our minds, it is very clear that there was no error in the ruling of the Courts below upon the Federal question involved, which alone can be considered by us. The District Court (meaning the State Court), was not bound to surrender its jurisdiction, until a case made which, on the face of the record, showed that the petitioners were in law entitled to removal. The mere filing of the petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statutes, a right to take the suit to another tribunal."

In Pennsylvania Company vs. Bender, 148 U. S., 255, this Court said: "We fully recognize the principle hereto-

fore asserted in many cases, that the State Court is not required to let go its jurisdiction until a case is made which on its face shows that the petitioner can remove the case as a matter of right."

In the case of National Docks Railway Company vs. Pennsylvania Railroad Company et al., 52 N. J., Equity, 58, the Court said: "This suit was brought to obtain an injunction prohibiting the defendant from further preventing the construction of a crossing and also, if necessary, for the appointment of a manager to regulate the use of the easement held by parties in common. The Pennsylvania Railroad Company now claims the right to remove this suit to the Circuit Court of the United States on two grounds: First, because its determination involves a decision of a question arising under the Constitution of the United States; and second, because the suit embraces a controversy which is wholly between it and the plaintiff and which can wholly be determined between them without the presence of the New Jersey Railroad & Canal Company. To effect such removal, a petition and bond was presented. The plaintiff denies however that the suit is removable and insists that it has the right to have the suit proceed here precisely as though no effort to remove it had been made. The plaintiff has a right to have the question thus raised decided by this Court, for it is settled by repeated decisions of the Supreme Court of the United States, that the State Court is not required to let go its jurisdiction until a case is made which, upon its face shows that the defendant's asking for the removal can remove the suit as a matter of right. The decision of this question is a duty which this Court cannot escape."

That State Courts are at liberty to consider the actual facts arising on the face of the record after the presentation of the petition for removal, and, applying the law thereto, determine whether or not the applicant is entitled

to a removal before jurisdiction is lost, cannot be questioned.

Burlington, Cedar Rapids & Northern R'y Co., vs. Dunn, 126 U. S., 513.

Carson vs. Hyatt, 118 U. S. 430.

Stone vs. South Carolina, 117 U. S. 430.

Although plaintiff in error may raise a Federal question in its answer it is settled that where the jurisdiction of the Federal Court, whether original or by removal, depends upon a Federal question, it must affirmatively appear from allegations in the declaration or bill of complaint; and no statement in the petition for removal or in his answer or demurrer, can supply that want when it is not so stated affirmatively in the petition.

We lay down this propostion for the purpose of showing that if the Federal Court was not vested with jurisdiction the very moment after the application for removal was filed, it cannot afterwards be vested with such jurisdiction by reason of any answer, motion or amended pleading. In other words, the question of jurisdiction depends altogether upon the condition in which the petition or bill of complaint is found at the time the request for the removal is made. So that if the State Court had jurisdiction the moment after the application for removal was filed, and no other application for a removal having been filed, its jurisdiction continued and any action that it took with reference to the case in prosecuting it to the final judgment would be legal, so far as the Federal Courts are concerned, and cannot be disturbed.

In the case of Tennessee vs. Union Planters Bank, 152 U. S., 459, decided at the October Term, 1895, Mr. Justice Gray, in delivering the opinion of the Court, said: "The third article of the Constitution enables the judiciary de-

partment to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judiciary power is incapable of acting on it. That power is incapable of acting only when the question is submitted to it by a party who asserts his right in the form prescribed by law. It then becomes a case and the Constitution declares that the judiciary power shall extend to all cases arising under the Constitution, laws or treaties of the United States. And when an action to which the judiciary of the union is entitled, by the Constitution, forms an ingredient of the original case, it is the power of Courts to give the Circuit Courts jurisdiction of that case, although other questions of fact or of law may be involved in it. But the right of plaintiff to sue cannot depend upon the defense which the defendant may choose to set up. His right to sue is anterior to that defense and must depend on the state of things when the action is brought. The question which the case involves then must determine its character whether those questions be made in the case or not. But, as has been decided, the suit must be one in which some right, title or immunity on which the recovery depends will be defeated by a consideration of the Constitution or of a law or treaty of the United States, or sustained by a contrary construction. A cause cannot be removed from a State Court simply because in the prosecution of the litigation it may be necessary to give consideration to the Constitution or laws of the United States; and the question whether a party claims the right under the Constitution or laws of the United States is to be ascertained by a legal consideration of his own allegations and not to the effect attributed to those allegations by the adverse party."

In the case of Campbell vs. Waterworth, 155 U. S., 102, it was held that under the Act of March 3, 1887, a case not depending on the citizenship of the parties, when otherwise

especially provided for, cannot be removed from the State Court into a Circuit Court of the United States as one arising under the Constitution or laws or treaty of the United States, unless the fact appear by plaintiff's statement of his own claim; and if it does not appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleading.

After the case has been removed to a Circuit Court of the United States, which has no jurisdiction of either the person or subject matter, its jurisdiction cannot be secured or perfected by means of affidavits, amendments or pleadings upon the part of either the plaintiff or the defendant.

Walker vs. Collins, 167 U. S. 157.

Pratt vs. Paris Gas Light & Coke Company, 160 U. S. 255.

Railroad Company vs. Scottowe, 162 U. S. 499.

Cable Company vs. Aalbama, 155 U. S. 482.

When it appears to the Circuit Court of the United States, to which a removal has been had, that from a consideration of the record on its face that no jurisdiction is given it and that the jurisdiction still remains in the State Court, it is the duty of such United States Court to remand the same to the State Court, whether asked to do so by the parties or not, and jurisdiction cannot be given to said Federal Court under any circumstances even though the parties would agree thereto.

Graves vs. Corben, 132 U. S. 571.

Railroad vs. Swan, 111 U. S. 379.

If the judicial facts are not stated in the petition, an amendment stating them cannot be allowed in the Federal Court.

Foster's Federal Practice, Sec. 391.

In the case Crheore vs. Railroad Company, 131 U. S., 245, the Court said: 'It thus appears that a case is not in law removable from a State Court upon the ground that it involves a controversy between citizens *of different* States, unless at the time the application for removal is made, the record on its face shows it to be removable. We say upon its face, because the State Court is only at liberty to inquire whether on the face of the record a case has been made which requires it to proceed no further; and all issues of fact made upon the petition for removal must be tried in the Circuit Court. If the case be not removable the jurisdiction of the State Court remains unaffected and under the act of Congress the jurisdiction of the Federal Court could not attach until it becomes the duty of the State Court to proceed no further. No such duty arises unless the case is made by the record that entitled the party to a removal. If a suit entered upon the docket of the Circuit Court is removed upon the ground of diverse citizenship of the parties, was never, in law, removed from the State Court, no amendment of the record made in the formed could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of date when it was there docketed; for the only mode provided in the Act of Congress by which the jurisdiction of a State Court of a controversy between citizens of different states can be divested is by presenting a petition and bond in that Court showing, in connection with the record, a case that is removable. * * *

This question was before us at the present term in Stevens vs. Nichols, which was brought in a State Court, and tried in a Circuit Court of the United States as one involving a controversy between citizens of different states, and therefore removable from the State Court. But as the record did not show that it was a removable case, the judgment was reversed with directions to send the case back to the State Court. It is proper to say that the question was

there fully considered. The present motion, bringing that question distinctly before us, seems to require that reasons for our conclusion be stated with fulness, especially because inadvertent language in some previous case is interpreted as announcing different views from those now expressed. The motion to modify the order of reversal is therefore denied."

In Jackson vs. Allen, 132 U. S., 271, it was held that when it appears from the record in the State Court in a case commenced in said Court and removable to the United States Court on the grounds of diverse citizenship and proceeds into judgment there, that the citizenship of the parties at the time of the commencement of the action, as well as at the time of filing the petition for removal, is not sufficiently shown, and that therefore, the jurisdiction of the State Court was never divested, the defect cannot be cured by amendment and the judgment of the Circuit Court will be reversed at the cost of plaintiff in error, and remitted to that Court with direction to remand to the State Court.

We have treated this question of the right of removal, and the very envious manner in which courts guard their jurisdiction, more fully perhaps than is necessary. We would not have done so had not Judge Phillips in his opinion in the District Court on the motion to remand (97 Fed. Rep., p. 113), intimated that the District Court had jurisdiction because a federal question was presented by the answer filed by plaintiff in error after the petition for removal was passed upon. It matters not what may be raised after the petition for removal has been considered, as no such subsequent pleadings will transfer jurisdiction from the State Court.

NOTHING BUT THE RIGHT TO REMOVE A CASE TO THE DISTRICT COURT WILL BE CONSIDERED.

A writ of error to a State Court brings before the Supreme Court of the United States nothing but the Federal questions involved and raised by plaintiff in error while the

case was pending in the State Court. This Court will consider only such propositions as were raised in the State Court and necessary for the judgment therein rendered. This principle is of long standing and need not be presented at length.

VI.

CONCLUSION.

In conclusion, we respectfully submit that no error was committed by the State Court in refusing to surrender jurisdiction of this cause, and no error committed in trying same without delaying proceedings until the Federal Court had remanded it.

The Federal Court was at no time vested with jurisdiction, and not being vested, the State Court could not be checked in the exercise of its functions in the proper administration of the laws of the State.

It is true that if the record had shown on its face that plaintiff in error should have been granted a removal it would have been the duty of the Court to recognize such right; and even though the State Court had refused to make an order of removal, it would have no authority to proceed further, and all further orders would be void or voidable, as the case might be. But such, however, is not the state of facts here. The record shows on its face that no right accrued to plaintiff in error entitling it to a removal; that there was not a diversity of citizenship as required, and that no other legal reason was stated or assigned as cause for removal. It is therefore, evident that under the authories heretofore cited, it was the duty of the State Court to proceed as though no such application had been filed.

EDWARD C. CROW, Att'y-Gen'l.
SAM B. JEFFRIES, Ass't Att'y-Gen'l,
For Defendants in Error.

No. 184. 11.
Opp. to Pet. of Def.
Filed Dec. 10, 1909.

In the Supreme Court
FILED
DEC 10 1909
Clerk

CONSTITUTION AND LAWS.

Supreme Court of the United States.

OCTOBER TERM, 1909.

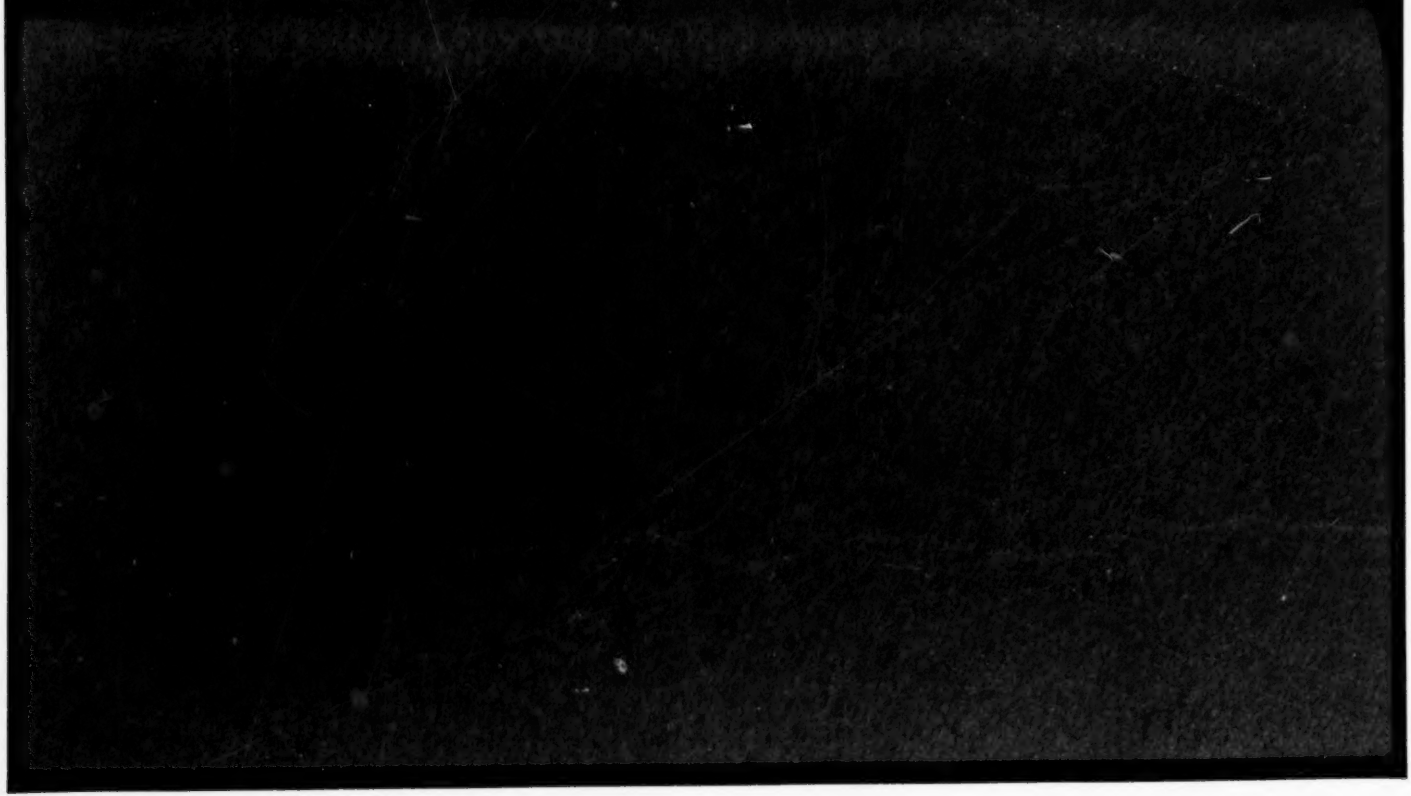
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Defendants in Error.

COMPILATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS IN REGARD TO RAILROADS AND DUTIES OF RAILROAD COMMISSIONERS.

FILED ON PART OF DEFENDANTS IN ERROR.



File No. 17502.

CONSTITUTION AND LAWS.

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error.

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, Constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri, Defendants in Error.

COMPILATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS IN REGARD TO RAILROADS AND DUTIES OF RAILROAD COMMISSIONERS.

FILED ON PART OF DEFENDANTS IN ERROR.

For the convenience of the Court we have printed and herewith file a complete compilation of constitutional and statutory provisions of Missouri affecting and governing railroad companies and their right to do business in the State.

CONSTITUTIONAL PROVISIONS.

Article XII of the Constitution of Missouri, in treating of railroads, contains the following provisions:

Sec. 12. Discrimination Prohibited — Commutation Tickets.—It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the general assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates.

Sec. 13. May Construct and Operate, Connect and Intersect Other Lines—Freight.—Any railroad corporation or association, organized for the purpose, shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other states. Every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination.

Sec. 14. Railways Public Highways—Laws Against Extortion, etc.—Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties.

Sec. 15. Shall Have Public Office, Keep Books—Meetings of Directors.—Every railroad or other corporation, or-

ganized or doing business in this State under the laws or authority thereof, shall have and maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made, and where shall be kept, for public inspection, books in which shall be recorded the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of said stock, with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. The directors of every railroad company shall hold one meeting annually in this State, public notice of which shall be given thirty days previously, and shall report annually under oath, to the State Auditor, or some officer designated by law, all of their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law. The General Assembly shall pass laws enforcing, by suitable penalties, the provisions of this section.

Sec. 16. Property Subject to Execution—No Law to be passed Exempting.—The rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale.

Sec. 17 Shall Not Consolidate With Parallel Lines.—No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of

a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues.

Sec. 18. Consolidation With Foreign Companies.—If any railroad company organized under the laws of this State shall consolidate, by sale or otherwise, with any railroad company organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation; but the courts of this State shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place. In no case shall any consolidation take place, except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law.

Sec. 19. Laws Retrospective or in Aid of Corporations Forbidden.—The General Assembly shall pass no law for the benefit of a railroad or other corporations, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State, a new liability in respect to transactions or considerations already past.

Sec. 20. Street Railroad, Franchise, how Granted.—No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained.

Sec. 21. Railroad Corporation, Benefit of Future Legislation.—No railroad corporation in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution applicable to railroads.

Sec. 22. Officer of Railroad Not to be Interested in Business.—No president, director, officer, agent or employe of any railroad company shall be interested, directly or indirectly, in furnishing material or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company.

Sec. 23. Discrimination Between Companies and Individuals.—No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad company or any lessess, manager or employe thereof, shall make any preference in furnishing cars or motive power.

Sec. 24. Free Passes, Granting to State Officers, Forfeiture.—No railroad or other transportation company shall grant free passes or tickets, or passes or tickets at a discount, to members of the General Assembly, or members of the Board of Equalization, or any State, or county, or municipal officers; and the acceptance of such pass or ticket, by a member of the General Assembly, or any such officer, shall be a forfeiture of his office.

Sec. 5. Art. XII. Police Power of the State.—The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.

2.

STATUTORY PROVISIONS OF MISSOURI CONCERNING RAILROAD AND BOARD OF RAILROAD COMMISSIONERS.

Sec. 1034. Any Number of Persons, Not Less Than Five, May Form a corporation.—Any number of persons, not less than five, may form a company for the purpose of

constructing, maintaining and operating a railroad for public use in the conveyance of persons and property; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained or operated, the length of such road, as near as may be, and the name of each county in the state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of standard or broad gauge, nor less than five thousand dollars for every mile of narrow gauge road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of the directors of the company, not less than five nor more than thirteen in number, who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of section 1036, such articles of association may be filed in the office of the Secretary of State, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in said company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions relating thereto contained in this chapter.

Sec. 1035. General and Additional Powers.—Every corporation formed under this article shall, in addition to the powers hereinbefore conferred, have power: First, to

cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon the lands or waters of any person; but such corporation shall be liable and subject to responsibility for all damages which shall be done thereto; second, to take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only; third, to lay out its road, not exceeding one hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this chapter for lands taken for the use of the company; fourth, to construct its road across, along or upon any stream of water, water-course, street, highway, plank-road, turnpike or canal which the route of its road shall intersect or touch, but the company shall restore the stream, water-course, street, highway, plank-road and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness. Nothing herein contained shall be construed to authorize the erection of any bridge or other obstruction across or over any stream navigated by steamboats, at the place where any bridge or other obstruction may be proposed to be placed, so as to prevent the navigation of such stream, nor to authorize the construction of any railroad not already located in, upon or across any street in a city or road of any county, without the assent of the corporate authorities of said city, or the county court of such county; fifth, to cross, intersect, join and unite its railroad with any other railroad before

constructed, at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings and switches and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court, as is provided in this chapter for the condemnation of lands for railroad purposes; sixth, to take and convey persons and property on their railroad by the power or force of steam or of animals ,or by any mechanical power, and to receive compensation therefor; seventh, to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freights and business; eigth, from time to time to borrow such sums of money as may be necessary for the completion, equipment or repair of their railroad, or for the funding of any floating debt, or for the making of any addition or extension thereto authorized by their charter, or for the making connection with any bridge by tunnel or otherwise; and for any or all of the purposes above named, may issue and dispose of their bonds for any amount so borrowed, and may mortgage their corporate property and franchise, or any part thereof, to secure the payment of any debt contracted by the company for the purposes aforesaid, or any one of them: *Provided*, that the entire amount of the bonded indebtedness of said corporation shall never exceed the amount of its authorize capital, nor shall such corporation increase its bonded indebtedness except for the purposes and in the manner provided in section 962; ninth, to con-

struct, maintain and operate in connection with any railroad bridge across any water-course or navigable stream of water within this State a toll bridge for the passage of wagons, vehicles, foot-passengers and animals, and to charge reasonable rates of toll therefor: *Provided, however*, that any such toll bridge shall not be so construed as to prevent the navigation of such water-course or stream of water.

Sec. 1036. Articles of Association, When to be Filed. Such articles of association shall not be filed and recorded in the office of the Secretary of State, until at least one thousand dollars of stock for every mile of standard or broad gauge railroad, nor until at least five hundred dollars of stock for every mile of narrow gauge railroad proposed to be made, is subscribed thereto and five per cent. paid thereon, in good faith and in cash to the directors named in said articles of association; nor until there is indorsed thereon, or annexed thereto an affidavit, made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and five per cent. paid in cash thereon, as aforesaid, and that it is intended, in good faith, to construct or maintain and operate the broad, standard or narrow guage road mentioned in such articles of association; which affidavit shall be recorded with the articles of association, as aforesaid: *Provided*, that such articles of association shall not be filed and recorded until such corporation or association shall pay into the state treasury fifty dollars for the first fifty thousand dollars or less of the capital stock of the corporation or association, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law.

Sec. 1037. Copy of Articles of Association Evidence, When.—A copy of any articles of association filed and recorded in pursuance of this article, or of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or

annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Sec. 1038. Directors to Appoint Officers.—The directors shall appoint one of their number president; they may also appoint a treasurer and secretary, and such other officers and agents as shall be prescribed by the by-laws of the company.

Sec. 1039. Shall be Subject to Certain Regulations in the Election of Directors.—Every railroad company or corporation formed under the provisions of this article shall, in addition to the law regulating private corporations concerning the election of directors, be subject to the following regulations: First, at every election of directors, three persons, having the qualifications of directors, shall be chosen by the persons entitled to vote for directors, as inspectors of election, whose duty it shall be to act as such, and any two of whom shall be competent to act; each acting inspector shall be entitled to a reasonable compensation for his services, to be paid by the corporation for which he is chosen: *Provided*, that the inspectors of the first election for directors shall be chosen by the board of directors named in the articles of association; second, no person shall be chosen or appointed an inspector of an election of directors in a corporation of which he shall be a director or officer.

Sec. 1040. Capital Stock Increased, When.—In case the capital stock of the company formed under this act is found to be insufficient for constructing and operating its road, such company may, with the concurrence of the persons holding the larger amount in value of the stock, increase its capital stock or its bonded indebtedness from time to time in the manner prescribed by law.

Sec. 1041. Persons Holding Stock in Fiduciary Capacity Not Liable as Stockholders.—No person holding stock in any such company, as executor, administrator, guardian

or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent ,as the testator or intestate of the ward or person interested in such fund would have been, if he had been living and competent to act, and held the same stock in his own name.

Sec. 1042. Transportation Certificates May be Issued —Effect of.—Any railroad company heretofore incorporated, or which may be hereafter organized or incorporated in this state in pursuance of law, may receive subscriptions to the capital stock of such company or corporation to aid in the construction or equipment of its road, to be known as "transportation subscriptions," and the certificates of stock to be issued thereon, as hereinafter provided, shall be known as "transportation certificates," each of which shall be for an amount equal to one share of stock in such company, and may be issued to one or more persons, and shall entitle the holder or holders thereof, or their assigns or legal representatives, to all the privileges of a stockholder in such company, but shall not subject the holder to any liability for the debts or obligations of such company, and shall be an irrevocable and indefeasible first lien and charge upon and against such railroad, and the road-bed, rolling stock and depots, engine houses and machine shops of such company, then in possesion of or thereafter acquired by such company or its successor or successors or assigns, whether in the hands of such company or of any other person, company or corporat'on whatsoever into whose hands or possession the same may at any time come, until taken up, paid or discharged by such company as hereinafter provided, except

the liens provided by law in favor of the employes of a railroad company, and in favor of parties performing labor, or furnishing materials for the construction or the improvement of the road-bed, rolling stock, station houses, depots, bridges or culverts, and except as to mortgages recorded in the county or counties through which the line of such road runs or is proposed to be run, before the date of the making of such subscription; which mortgages shall have the preference only as to so much of such road and the property of such company as lies or is situated in counties in which the same are at that time recorded; and such mortgage shall not have any preference as a lien upon any property of such company acquired after the time of making such subscriptions.

Sec. 1043. Subscription for Certificates, How Taken —Certificates to Issue, When.—Whenever any railroad company shall decide, by a majority vote of the stockholders present at any regular meeting, to obtain subscriptions as provided for in the preceding section, they shall prepare a statement of the terms and conditions upon which they will take the same, together with the rates at which they propose to transport passengers and freight in exchange for such certificates, which statement shall be signed by the president and countersigned by the secretary of said company, and acknowledged in the manner in which conveyances of real estate are required by law to be acknowledged, and recorded in the office of the recorder of deeds of the county in which such subscriptions are proposed to be taken, before taking any subscriptions, and shall open a subscription book or books, which shall be headed with a copy of the statement aforesaid, and be ruled in appropriate columns for the names of subscribers, the number of shares subscribed for by each, date of the subscription, and the time and manner of payment, whether in money, property, material or work, which book or books shall be in duplicate,

and so signed by all subscribers before their subscriptions shall be binding, one copy of which shall be retained by said company, and the other deposited and kept in the office and charge of the clerk of the county court of the county in which the subscribers reside, who shall keep the same as a public record of his office, but never allow it to be taken therefrom; and upon so singning such subscription books, the signer or signers, respectively, shall severally become liable and bound to pay the amount, or perform the work or furnish the material by them respectively subscribed, at the time and place, and in the manner required by the terms of the subscription; and such company, its successors and assigns, shall be bound on its part by all the terms and stipulations thereof, and to issue certificates of stock as aforesaid, to each of said subscribers, upon their fulfillment of the terms of their several contracts and subscriptions; and any such copmany, its successors or assigns, failing or refusing to issue such certificate or certificates to any subscriber or subscribers, upon demand, after he or they shall have complied with the terms of his or their subscription or subscriptions, and done the work, or furnished the material, or deposited the money called for thereby with the treasure of such company, or with the county treasurer of the county in which such subscriber resides, to the credit of such company, or refusing to take or accept the proportional part thereof in payment of freight charges or passenger fare, as hereinafter provided, shall, in addition to all other liabilities for the breach of such contract, be liable to be enjoined at the suit of any one or more of the subscribers so aggrieved, against running trains upon, or in anywise operating or conducting such road until such certificate shall be issued or acceptance made.

Sec. 1044. Certificates, How Issued—May be Sued on, How.—Any two or more persons may unite in their sub-

scriptions so as to make the same joint as well as several, and have the certificates of stock issued thereon to them jointly; but in the absence of express agreement to the contrary, all subscriptions shall be several and not joint, and may be sued upon severally in any court of competent jurisdiction, without filing the original subscriptin list as an exhibit in the cause.

Sec. 1045. Certificates Shall Draw Interest and Be Assignable.—Every certificate of stock issued under the provisions of this article shall recite that fact upon its face; shall draw interest from date at six per cent. per annum, unless otherwise agreed in the articles of subscription; and shall be assignable by indorsement, under the hand of the holder thereof, and shall entitle the holder or his assignee to an amount of transportation, either freight or passenger, in his own right or at his request, over any and all parts of the road of such company, its successors, assigns, lesses, or any company operating the same at the time, to an amount equal to the face value thereof and accrued interest, if any, at rates not exceeding those set forth in the recorded statement hereinbefore provided for: *Provided*,, that such company shall have a right to require one-half of each freight bill, or of the fare for each trip, to be paid in cash, and that the remainder only shall be credited thereon until the amount due and unpaid shall be less than one-eighth thereof, after which such holder shall be entitled to freight or passage to an amount equal to the balance due thereon until the same is all paid, when it shall be delivered up to said company, and the rights of such holder thereunder shall cease: *Provided, further*, that no assignment of any such certificate shall create any other or greater liability in the assignor than is expressly created by such assignment.

Sec. 1046. Correct Record of Certificates Issued to Be Kept—Shall Show What.—Every railroad company taking subscriptions under this article shall keep in its principal

office in this state, open to inspection, a correct record of all such certificates of stock issued by them or their assignor or predecessor, showing the number, date, and to whom issued, and when canceled; and it shall be the duty of the county clerk, upon production by such company of any such canceled certificate, to note the fact and date of such cancellation in his office.

Sec. 1047. Who Ineligible to Office.—It shall be unlawful to elect or appoint any person to any office of profit or trust, or for such person to hold such office or appointment, in any railroad corporation established by any law of this state, who is a stockholder, owner or part owner of any express, dispatch, fast freight or transportation company, whether incorporated or not, which has for its object, or one of its objects, the shipment of freight or transportation of persons over said railroad, or any railroad in direct connection therewith, or who is in any way pecuniarily interested in any company or copartnership, formed for any such or like purpose; and all persons interested as aforesaid are hereby declared ineligible for any such office or appointment.

Sec. 1048. Penalty for Holding Office in Violation of the Preceding Section.—If any person shall be elected to any office or appointed to any position in violation of the preceding section, and shall hold any such office or appointment, he shall forfeit and pay the sum of one hundred dollars for each and every day that he shall exercise the functions of said office, which amount may be recovered at the suit of any stockholder of the company in which the office or appointment shall be unlawfully held. Such suit shall be in the name of the company, and one-half of the amount received shall go into the treasury of the company, and the other half to the stockholder prosecuting.

Sec. 1049. Capital Stock May Be Reduced, When and How.—Any railroad company incorporated by the laws of this state may at any time reduce the amount of their

capital or common stock by a vote of three-fifths in interest of all the stock of such company to be affected thereby, at a stockholders' meeting, called in conformity to the by-laws of such company; and if so voted for, said capital stock may be reduced upon the plan in detail thus submitted to the stockholders: *Provided*, that such reduction shall be so made as to affect the interests of all stockholders alike: *Provided*, that nothing in this section shall be so construed as to permit the reduction of the capital stock of any company below the minimum amount prescribed by law.

Sec. 1050. Preferred Stock May Be Issued, When.—Any railroad company organized under the laws of this state may issue a preferred stock for such amount, and upon such terms and conditions, as the board of directors may prescribe. But before any issue of such preferred stock shall be made, the question of issuing the same, together with the terms, conditions and privileges upon which the same is proposed to be issued, shall be submitted to a vote of the stockholders of said company, at a regular annual election for the directors thereof, or at a special meeting of the stockholders of said company called to consider the same, if at such election all the stockholders shall consent. At all elections called to consider the question of issuing preferred stock, as provided in this section, no person shall be permitted to cast any vote as a proxy for the owner of any share or shares of stock without he shall produce written authority, signed by the owner thereof, and duly acknowledged before some officer having authority to take the acknowledgment of deeds; and a record of such authority showing the name of the owner of the stock, and the name of the person casting such vote in his behalf, shall be entered upon the records of the company in a book to be kept for that purpose; *and it is also further provided*, that when a dividend of ten per cent. per annum shall have been declared upon the preferred stock of any company, issued in pursuance of this

section, then all other dividends shall be declared and distributed *pro rata* until the dividends on the common stock shall equal the dividends on the preferred stock, among all the stockholders of such corporation; *and provided further,* that nothing contained in this section shall be so construed as to give the holders of the preferred stock herein provided for any other or greater power in the control and management of any corporation, or in the election of the officers thereof, than is exercised by the owners of the original or common stock of such company. Said preferred stock shall be offered to all the common stockholders *pro rata* in proportion to the amount of common stock held by them. If any common stockholder shall fail to take such preferred stock after thirty days' notice by publication in two daily newspapers in St. Louis, and written notice to clerks of counties holding stock, then any other person may buy said stock.

Sec. 1051. Road-bed May Be Changed—Gauge.—The directors of any railroad company heretofore incorporated under any general or special law, or that may hereafter be organized under the provisions of this article, may, by a vote of two-third of their whole number, at any time change their road-bed, or road-line, or any part thereof, for the purpose of shortening the line or to overcome natural objections thereto, or to secure economy in its construction; and when the capital stock of such company subscribed, and the amount paid thereon, shall be equal to or exceed the amount per mile, including the proposed extension, which, by section 1036, is required to be subscribed and paid before filing the original articles of association, then such company may, by a like vote of its directors, at any time extend its line or road-bed from either terminus named in its original charter to such other point as shall be named in such proceedings of such company. And whenever the business of any railroad company which may have heretofore organized or which may

hereafter organize to construct a railroad of any guage may demand a change of the guage thereof, or whenever for other causes such change of gauge may become necessary or desirable, such company may, by a like vote of its directors, change its gauge, if a narrow, to a broad or standard, and if a board or standard, to a narrow gauge railroad: *Provided*, that if such railroad desiring such change of gauge be a narrow gauge railroad, such change of gauge shall not be made unless the capital stock of said company shall be at least ten thousand dollars per mile of such road constructed, or shall be increased in the manner provided in this chapter to such sum, nor unless there shall be subscribed in good faith at least one thousand dollars per mile of such road constructed or proposed to be constructed, and five per cent. thereon paid in cash, nor until such company shall pay into the state treasury the sum of five dollars for every ten thousand dollars of increased capital stock made necessary by such change of gauge. Such proceedings in relation to the extension of their road shall be entered on the record of the company, and a copy of such proceedings, with a affidavit as required by section 1036 indorsed thereon, shall be filed in the office of the secretary of state, and by him recorded and certified as the original articles of association. But nothing contained in this article shall be so construed as to authorize such company to change the general route of their line or road-bed, or to avoid running their road through any point named in the original articles of association, or either terminus named therein, or to change the last established terminus except by extension of their road as aforesaid.

Sec. 1052. Right of Way Through State Lands.—The right of way is hereby granted to any railroad company through any unimproved land belonging to this state, through which their railroad may pass; and in case any more land belonging to this state shall be required for the

purpose of any railroad corporation than is needed for the track of the road, and in case any improved land belonging to the state shall be necessary for the purpose of any railroad corporation, the secretary of state shall have power to grant to any railroad company any land belonging to this state which may be required for the purposes of their road, on such terms as may be agreed on between said secretary of state and said company; or such company may acquire title thereto by appraisal, as in the case of land owned by individuals; and if any land belonging to a county, city or town is required by any company for the purposes of their road, the county or city or town officers having charge of such land may grant to such company, on such terms as may be agreed upon, or the land may be appraised in the manner aforesaid.

Sec. 1053. Title to Lands of Persons not Sui Juris, How Acquired.—In case any title or interest in real estate required by any company formed under this article for the purpose of its incorporation shall be vested in any trustee not authorized to sell, release and convey the same or in any infant, idiot or person of unsound mind, the circuit court shall have power by a summary proceeding on petition to authorize and empower such trustee, or the court having probate jurisdiction, or the special guardian of such infant, idiot or person of unsound mind, to sell and convey the same to such company, for the purposes of its incorporation, on such terms as may be just; and in case any such infant, idiot or person of unsound mind is not in charge of said court or guardian, the said court may appoint a special guardian for the purpose of making such sale, release or conveyance, and may require such security from such special guardian as said court may deem proper. But before any conveyance or release, authorized by this section, shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is

satisfied that such terms are just to the parties interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executd, which shall have the same effect as if executed by an owner of said land, having legal power to sell and convey the same.

Sec. 1054. School Lands, How Title Acquired.—In all cases when it becomes necessary for any railroad company to acquire title to any unsold sixteenth section, or other school lands, required for the purposes of the incorporation, it shall be lawful in proceedings instituted by such railroad company to acquire title thereto, to notify the county school commissioner of the county in which such land, or the greater part thereof, is situate; or, if there be no such commissioner qualified to act, then such notice may be served upon the presiding justice of the county court of the county in which such land, or the greater part thereof, is situate; and like proceedings shall be had as in other cases.

Sec. 1055. May Take and Hold Lands for Side-Tracks and Depots.—Any railroad company in this state shall have the right to take and hold all necessary ground for depots and side-tracks, and if the title thereof cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured, such company may proceed to condemn the same, in the same manner and with the same effect as is now provided by law for the condemnation of other lands.

Sec. 1056. Shall Fiile Profile Maps, When.—Every railroad company shall, before constructing any part of their road into or through any county named in their articles of association, and every company heretofore formed and now operating roads in any county in this state, shall make a profile map or maps of the route intended to be or already adopted by such company in such county, which map or maps shall show the actual survey, location and distance of the road-bed through the congressional sections through

which such road runs, and also the location and number of miles of main and side-tracks of such road in such county, and which map or maps shall be certified by the president and engineer of the company or a majority of the directors, and filed in the office of the clerk of the county court of the county in which the road is to be or has been made. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company.

Sec. 1057. Company Liable to Sub-contractors, Laborers, etc., When.—Whenever any contractor for the construction of any part of a railroad which is in process of construction, or any contractor for the repairing of any part of a railroad, shall be indebted to any sub-contractor or laborer, or other person, who shall do or perform any work or labor upon or furnish any materials for said road, such sub-contrator or laborer, or other person, may give notice of such indebtedness to said company in the manner hereinafter provided; and said company shall thereupon become liable to pay such sub-contractor or laborer, or other person, the amount so due, and action may be maintained against said railroad therefor; such notice shall be given by said sub-contractor, laborer or other person, within twenty days after the performance of the labor or work, or the delivery of the materials, for which the claim is made; such notice shall be in writing, and shall state the amount and number of days labor or work, and the amount, description and quantity of materials furnished and the time when the said labor or work was performed, and the time when the said materials were furnished, for which the claim is made, and the name of the contractor from whom due, and shall be signed by such sub-contractor, laborer or other person, or their attorney, and shall be served on an engineer, agent or other person employed by said company having

charge of the section of the road on which said labor or work was performed, or such material furnished, personally, or by leaving said notice in the office or usual place of business of such engineer, agent or person having charge, with some person over fifteen years of age; but no action shall be maintained against any company under the provisions of this section, unless the same be commenced within ninety days after notice is given to the company by such sub-contractor or laborer, as above provided.

Sec. 1058. May Take Material for Construction, When and How.—Any company shall have power, by themselves or agents, to enter and take from any land in the neighborhood of the line of their railroad, earth, gravel, stone, wood, water, or other material necessary for the construction and operation of said road, and also for the purpose of depositing thereon earth, stone, gravel, etc., and for the purpose of procuring water for their uses; may lay pipes, erect pumps, dams and reservoirs, and maintain and keep the same in repair, paying, if the owner of said lands and the said company can agree, the damages they shall do to said land or its appurtenances; or, if they cannot agree, then said company, before entering upon the land, shall apply to a justice of the peace of the county for the appointment of three commissioners, who shall be freeholders and disinterested, to ascertain the amount of the damages, who, being duly sworn by the justice impartially and faithfully to discharge the duties devolving on them, shall then ascertain the compensation, upon their own view of the grounds, and of the wood, earth, stone or gravel which may be taken therefrom, or the earth, stone, gravel, etc., that may be deposited thereon, and the injury done in taking them, or depositing thereon: *Provided*, that it shall be the duty of the party making the application to show to the justice of the peace that ten days' previous notice of the time of making the same has been given to the other party, or to some one

of them; and no award which may be given under any appointment, without such notice, shall be obligatory or binding on the other party; and either party not satisfied with the award may appeal to the circuit court of the county in which said land may be, which may, at its discretion, confirm the said award and enter it of record, or, as often as may be deemed necessary, may supersede the said viewers, or any of them, appoint others in their stead, and direct another view and award to be made in the manner aforesaid. If any justice of the peace, or any freeholder, shall refuse or neglect to perform the duties assigned to them, respectively, or prescribed in this section, upon being thereto required by either party, as aforesaid, such justice or freeholder shall forfeit and pay to the party making the application a sum not exceeding twenty-five dollars, to be recovered before any justice of the peace of the county of which he is an inhabitant, and shall, moreover, be liable to the party aggrieved: *Provided*, that no property shall be entered upon or disturbed, or the title divested under the provisions of this section, until the amount assessed by the commissioners or the circuit court shall be paid to such land owner, or deposited with the justice, or in court or with the clerk thereof, for such owners.

Sec. 1059. Companies May Consolidate, When.—Any tw or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accompliish such

consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted: *Provided, however*, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except, when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction; *and provided*, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this article, such consolidation shall be void, and any person or party aggrieved, whether stockholder or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this state shall hereafter intersect any

such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms. Before any railroad companies shall consolidate their roads, under the provisions of this article, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated.

Sec. 1060. May Aid Other Railroads, on What Terms. Any railroad company hertofore incorporated or hereafter organized in pursuance of law may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purposes of forming a connection of the last mentioned road with the road owned by the company furnishing such aid, or any such railroad company which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may building, buy, lease or consolidate, in the manner provided in the preceding section, wiith any railroads in such adjoining state, and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all

of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state: *Provided,* that no such aid shall be furnish, nor any purchase, lease, sub-letting or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated or affected by such arrangements, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' public notice thereof having been previously given and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state; *and provided further*, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make an arrangement for operating the same as provided in this act, or shall extend its railroad into this

state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state, or licensing or permitting a corporation of another state, under any running arrangement, to run engines and cars upon its road in this state, shall remain liable as if it operated the road itself; and a corporation of another state, being a lessee of a railroad in this state, or running its engines and cars upon a railroad in this state under a license, permit or running arrangement, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases and for the same causes and in the same manner as a corporation of this state might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state, being the lessee as aforesaid, or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state.

Sec. 1061. May Acquire Other Lines—Assent of Stockholders Necessary.—Any railroad company heretofore organized, or which may hereafter be organized under the laws of this state, may extend its line of railroad beyond this state into or through any other state or territory, and may acquire any line of railroad within or without this state which shall form a continuous line with the road operated by such company, by direct connection or over any other line or lines constructed, or to be constructed, and which such company shall have the right, by contract or otherwise, when completed, to use or operate, and may ac-

quire and may hold the obligations and stock of other companies owning or operating any such lines of road: *Provided*, that no line of railroad shall be so purchased until a meeting of the stockhoiders of such company or companies of this state, party or parties to such an agreement, whereby a railroad in this state may be purchased, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' due notice thereof having been previously given, and the holders of a majority of such stock, by person or proxy, shall have assented thereto, or until a majority of the holders of the stock of such company shall have consented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secrêtary of state.

Sec. 1062. Consolidation with Competing Line Forbidden. It shall be unlawful for any railroad company, corporation or individual owning, operating or managing any railroad in the State of Missouri, to enter into any contract, combination or association, or by any manner of means whatever consolidate the stock, property or franchises of such company, corporation or individual, or to lease or purchase the works or franchises of, or in any way whatever to any degree exercise control over, any railroad company, corporation or individual owning or having under his or their control or management a parallel or competing line in this state, but each and every such railroad, whether owned, operated or managed by a company, corporation or individual, shall be run, operated and managed separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transporation under fair and open competition.

Sec. 1063. No Person Shall be an Officer in the Compet-

ing Lines.—It shall be unlawful for any officer of any railroad company or corporation, or any individual owning, operating or managing any railroad in this State as a common carrier, to act as an officer of any other railroad company or corporation owning, operating or managing, or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall be decided by a jury, when so demanded.

Sec. 1064. Commissioners shall Demand Report as to Violation of two Preceding Sections.—It shall be the duty of the railroad commissioners of this State, within thirty days after the approval of this act, and semi-annually thereafter, to make a written demand of the president or other chief officer of each and every railroad company, corporation or individual owning, operating or managing any railroad in this State, requiring such president or other chief officer or individual so owning, operating or managing any such railroad, within thirty days after the date of such demand, to make out or cause to be made out under oath, and deliver to said commissioners, a full and correct list of the names of all the officers of such railroad company, or corporation, and also certified copies of all contracts which such railroad company, corporation or individual may have entered into with any other railroad company, corporation or individual owning, operating or managing any railroad in this State, and that are in force relative to the terms and conditions upon which such railroad companies, corporations or individuals would carry on and transact their business in this State as common carriers. And it shall further be the duty of said commissioners, within the time above specified, or as speedily thereafter as may be, to thoroughly investigate by every means at their command, and ascertain, if possible, whether any such contract, combination or association as is prohibited by section 1062 exists, or whether the provisions of section

1063 are being violated in any manner, and for such purposes they shall have and may exercise all the powers conferred on them by this or any other statute of this State, and all copies of contracts that may be furnished in compliance with the demand so made by said commissioners, and any and all information which said commissioners may obtain relative to the violations of sections 1062 or 1063 shall be immediately delivered and imparted to the attorney-general of this State, and any president or other chief officer upon whom was made such demand as is hereinbefore specified, who shall fail, neglect or refuse to comp'y therewith, or who shall, in compliance with such demand, furnish any false or fraudulent contract, or who shall, under oath, furnish an incomplete or incorrect list of such officers as required by this act, shall, for so failing, neglecting or refusing to comply herewith, be guilty of a misdemeanor, and upon conviction thereof be fined not less than two hundred and fifty nor more than one thousand dollars, and for furnishing any false or fraudulent contract, or for making a false affidavit as to the list of the names of the officers, any such person so offending shall be guilty of a felony, and upon conviction thereof shall be confined in the penitentiary not less than two nor more than five years.

Sec. 1065. Duty of Attorney-General under Preceding Section.—It shall be the duty of the attorney-general at once, upon receipt of the copies of such contracts, and the information imparted by the railroad commissioners, to carefully examine said contracts and consider such information, and if he shall therefrom, or from any other source, have reason to believe that any railroad company, corporation or individual, as designated in section 1062, has entered into any such contract, combination, association or agreement as is therein declared to be unlawful, or that the provisions of section 1063 are in any manner being violated, and that a recovery can be had therefor, to immediately

institute such proceedings in any of the courts of this State having jurisdiction over the subject-matter, as may be necessary to enforce the provisions of this act; and such proceedings, if against any company, corporation or individual for a violation of the provisions of section 1062 herein, shall be instituted in the name of the State of Missouri, at the relation of the attorney-general, and may be against any one or more, or jointly against all the companies, corporations or individuals so offending, and if such proceedings are instituted for a violation of the provisions of sections 1063 or 1064, then they shall be proceeded with as in other cases of misdemeanors or felonies, and may be against any one or more, or jointly against all persons so offending; and all suits or prosecutions instituted under the provisions of this act shall have precedence except as to criminal cases, and shall be advanced on the docket by all the courts in which such proceedings shall be pending, and be disposed of as speedily as possible.

Sec. 1066. Penalties for Violating Sections 1062 and 1063—Forfeiture of Franchise.—Each and every railroad company, corporation or individual violating the provisions of section 1062 shall, for the first offense, be liable in the penal sum of not less than one thousand dollars nor more than five thousand dollars, and for the second offense shall be liable in the penal sum of not less than five thousand nor more than ten thousand dollars, and a conviction of a third offense, under the provisions of this act, for a violation of the provisions of section 1062, shall work a forfeiture of the franchise of each and every company, corporation or individual so convicted, having received a charter under the laws of this State, as for a willful misuser thereof, and if chartered under the laws of some other state, then all the rights and privileges of doing business in this State under the laws thereof as a common carrier shall cease and terminate, and the court before which the cause is tried

shall render such a judgment or decree as may be necessary and sufficient to enforce the provisions of this section for all purposes. Any officer or individual who shall violate the provisions of section 1063 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars for each offense, and each day that such person shall continue to act as an officer of such railroad company or corporation owning, operating, managing or having control of a parallel or competing line, after the first conviction under this act, shall constitute a separate offense, and in every case of a conviction under this act, the company, corporation, individual or officer so offending shall be liable for all costs, including reasonable fees for any attorney or attorneys who may be employed to assist the attorney-general, as hereinafter provided, and such fees shall be allowed by the court trying the cause, and shall be taxed up as a part of the costs in the cause.

Sec. 1067. Duty of Governor, upon Forfeiture of Franchise.—When a judgment or decree shall be rendered against any railroad company, corporation or individual upon a third conviction for violating the provisions of section 1062, a certified copy of such judgment or decree shall at once (unless such cause be appealed to some higher tribunal) be made out by the proper officer, and forwarded to the governor of the State of Missouri, who shall thereupon appoint some suitable and competent person to take charge of the assets of such company, corporation or individual, for the use of the creditors and stockholders, upon such terms, conditions and requirements as is now or that may hereafter be provided by law.

Sec. 1068. Costs of Procedure.—The actual and necessary costs incurred by the commissioners and attorney-general, in preparing and prosecuting cases under this act, including the fees of such assistant counsel as they may

consider it prudent to employ, shall be paid out of the State treasury upon a warrant to be drawn therefor by the railroad commissioners and countersigned by the governor: *Provided, however*, that no costs shall be incurred without the advice and consent of the governor; *and provided also*, that no greater sum than five thousand dollars shall be expended in any one year in endeavoring to enforce the provisions of this act; and for the purposes aforesaid there is hereby appropriated, out of the general revenue fund not otherwise appropriated, such an amount as may be requisite, not exceeding the sum of ten thousand dollars.

Sec. 1069. Penalties to go to State School Fund.—All fines and penalties recovered under this act shall be paid into the State treasury, and credited to the State school fund.

Sec. 1070. Directors shall Hold Meetings and Report to Railroad Commissioners, When—Report shall be Furnished Governor—Shall Contain What.—The directors of every railroad company or corporation which is now, or hereafter may be organized under the laws of this State, shall hold a meeting on the second Tuesday in March of each year, for the transaction of such business as may properly come before them, at their office or place of business which shall have been established in this State—thirty days' notice having been given by publication in two or more newspapers having the greatest circulation in the county or city in which the office of such railroad company or corporation shall be situated. The general manager or other chief officer of every such company or corporation, and the manager or other chief officer of every railroad company or corporation organized under the laws of another state, and owning, leasing, operating or controlling a railroad within this State, shall, on or before the 1st day of September of each year, transmit to the office of the railroad and warehouse commissioners of this State a state-

ment in detail of the affairs of such company or corporation as the same existed on the 30th day of June first preceding, and of the business operations of such company or corporation for the year ending the 30th day of June, as aforesaid. Said statements must be certified to under oath of the proper officer of said company or corporation, and must be made out upon printed forms, furnished by the railroad and warehouse commissioners, which printed forms shall contain all interrogatories necessary to obtain a full statement, in detail, of the organization, condition, business affairs and operations of such railroad company or corporation for the year ending the 30th day of June, as aforesaid. The railroad and warehouse commissioners shall, on or before the 31st day of December of each year, transmit to the governor of this State a report of their official acts for the year ending on the 30th day of June, as aforesaid; and the said report shall also contain a condensation of statistics, tabulated from the returns of the several railroad companies, together with all such information and recommendations concerning the regulation of the railroads of this State as the said commissioners may deem to be of public interest and importance.

Sec. 1071. Penalty for Violation of Preceding Section. The directors of any such railroad company who shall fail to hold such meeting, or neglect to make such report, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than two hundred and fifty nor more than one thousand dollars.

1072. Employes to Wear Badges of Identity.—Every conductor, baggage-master, engineer, brakeman or other servant of any railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, and the initial letters of the style of the corporation by which he is employed. No conductor or collector without such badge

shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

Sec. 1073. Interest Account with Stockholders to be Kept.—Any railroad company may open and keep an interest account with their stockholders, from the dates of their payments on their subscription, respectively; and, in order to place all their stockholders on an equal footing, may allow interest from the dates of such payments, payable in stock, for such time and under such regulations as the board of directors may prescribe.

Sec. 1074. Ejection of Passengers, When Lawful.—If any passenger shall refuse to pay his fare, or shall behave in an offensive manner, or be guilty of repeated violations of the rules of the company, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductors shall elect, on stopping the train.

Sec. 1075. Notice of Train Time Published—Depots at Junctions.—Every railroad corporation in this State which now is, or may hereafter be, engaged in the transportation of passengers or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the several stopping places, and shall, at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now or may hereafter be made upon the same grade, and the character of the land at such crossing

or intersection will admit of the same, erect, build and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains at such junctions or railroad crossings, and shall keep such depot or passenger house warmed, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers, at the junction or intersection of other railroads, a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting or intersecting roads whenever the same shall be delivered to them. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the first day of July, 1885, shall, for each day said corporation or railroad refuses, neglects or fails to comply therewith after said day, forfeit and pay a sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing is situate; and it shall be the duty of the prosecuting attorney to prosecute for and recover the same.

Sec. 1076. Passenger Trains—Change of Time—Notice to be Given.—Whenever any such railroad corporation may wish to change the time of running its passenger trains, due notice shall be given to the proper officer of

other connecting railroads of the time when trains will arrive and depart at such points of intersection or connection, to enable such other railroad companies to conform the running of their trains thereto.

Sec. 1077. Bulletin Boards at Stations.—Every railroad corporation in this state, which is or may hereafter be engaged in the transportation of passengers shall place or cause to be placed in a conspicuous place in or about each and every depot at which passengers shall be received, a bulletin board showing the time of the arrival and departure of all passenger trains at such stations; and at all stations or depots where a telegraph office is kept, the agent or telegraph operator at such station or depot shall, for the information of the traveling public, indicate on such bulletin board the delay of any passenger train, showing how much such train may be behind schedule time.

Sec. 1078. *Id.* Penalty on Agent for Failure to Put up Boards.—Any agent or telegraph operator of any such railroad corporation who shall violate the provisions of the preceding section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five nor more than twenty-five dollars.

Sec. 1079. Freight Accounts to Be kept—Books, How and When Produced.—All railroad companies in this state shall kept correct accounts of the time at which any freight is received for shipment, and shall transport the same in its proper time; and when, in the trial of any cause in any court, a party shall be entitled to have produced at such trial the books and papers of the company, including the receipt and freight-books, as well as the account of the shipments of such company, he shall have access to such books and papers as may be necessary, when authorized by an order of court, as is now provided in other civil cases.

Sec. 1080. Not Liable for Injury to Passenger, When. In case any passenger on any railroad shall be injured while

on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: *Provided*, said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers.

Sec. 1081. Companies May Contract With Each Other, etc.—All railroad corporations may contract with each other, or with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management.

Sec. 1082. Duties as to Receipt and Shipment of Freight.—Every such railroad corporation is hereby required to receive all freight or live stock which may be offered for transportation at the place of starting, at the junction of other roads, and at usual stopping places, and shall take, transport and deliver the same, without unnecessary delay, according to contract.

Sec. 1083. Car Regulations for Shipping Stock.—All corporations, private companies or individuals owning or operating any railroad in this state are required to furnish to shippers of live stock suitable and convenient stock cars, without unreasonable delay, with trap doors in the roof thereof, one near each end and upon opposite sides, large enough to conveniently admit a man's body; said trap doors shall be constructed near enough to the sides of the car to enable the shipper to conveniently descend to the interior of said car by means of a ladder or steps, which shall be constructed directly under such door. Such railroad company shall receive live stock for transportation to any place within the state; shall transport and deliver the same to any consignee, stock-yard or place to whom or to which it may be consigned and directed: *Provided*, such person, stock-yard or place can be reached by any track owned,

leased or used, or which can be used by such corporation; and every such corporation shall permit connections to be made and maintained with its tracks to and from any and all stock-yards where live stock is or may be kept. Any such corporation neglecting or refusing to comply with the requirements of this section shall be liable to all persons damaged thereby for all damages which they may sustain on that account, whether such damages result from any depreciation in the value of such property by such neglect or refusal to deliver such live stock as directed, or in loss to the proprietor or manager of any stock yard to which it is directed to be delivered, and costs of suit, including such reasonable attorney's fees as shall be taxed by the court; and in case of any second or later refusal of such railroad corporation to comply with the requirements of this section, such corporation shall be by the court, in an action on which such failure or refusal shall be found, adjudged to pay for the use of the people of this state a sum of not less than one thousand nor more than five thousand dollars for each and every such failure or refusal, and this may be a part of the judgment of the court in any second or later proceeding against such corporation.

Sec. 1084. Live Stock Shipped Speedily Without Discrimination.—Every railroad corporation chartered by or organized under the laws of this state, or doing business within the limits of the same, when desired by any person or corporation to ship live stock over its road in car-load lots, shall receive and transport such live stock in car-load lots within a reasonable time, from any stock-yard adjoining its tracks or side-tracks, or from the tracks of any other railroad corporation or stock-yard company, without distinction, discrimination or favor between one shipper and another, and without distinction or discrimination as to the manner in which such live stock is offered to it for transportation, or as to the person, stock-yard company or place

to whom or to which it may be consigned; and the penalties for any violation of the requirements of this section shall in all respects be the same, and shall be enforced and collected in the same manner as provided in the preceding section.

Sec. 1085. Shall Transport Shippers of Stock or Melons.—Whenever any railroad company or corporation doing business within the limits of this state shall receive and ship any live stock, or watermelons when shipped with the privilege of peddling along the line of said road or roads, by the car-load, said company shall, in consideration of the price paid for said car, pass the shipper or his employe to and from said point designated in contract or bill of lading without further expense to shippers, under penalties as in the two preceding sections: *Provided*, that this section shall not be so construed as to permit a shipper of live stock to peddle the same along the line of said road or roads.

Sec. 1086. Peddling Cars For Watermelons, etc.—The railroads of this state are required to carry peddling cars of watermelons or cantaloupes, strawberries, blackberries and other perishable fruits on the local or way freights when demanded by the shipper, and the freight rate on peddling cars shall be the same as on through cars, and no extra charges shall be made for the privilege of peddling; and the penalties for any violation of the requirements of this section shall in all respects be the same as provided in section 1083 of the Revised Statutes: *Provided*, this section shall only apply to melons and cantaloupes, strawberries, blackberries and other perishable fruits grown in this state.

Sec. 1087. Agent Shall Count Stock.—Whenever any shipper of hogs, cattle, sheep, horses or other animals shall present his stock at any railway station for purposes of transportation, it shall be the duty of the railway agent at such station to count, or cause to be counted, said hogs, cattle, sheep, horses or other animals, and the number so

counted shall be by the agent named in the bill of lading or receipt for such stock; and if said agent refuse or neglect to count or have counted said stock, then the railway company employing said agent shall be held responsible for the number of animals specified in such bill of lading or receipt, according to shipper's count.

Sec. 1088. Shipper May Mix Freight—Own Risk.—Whenever any shipper shall order one or more cars for the purpose of transporting any kind of stock, grain, or any other article of commerce or trade, he shall have the right and privilege to put in said car or cars two or more species of live stock, or different kinds of grain, or different articles of commerce or trade: *Provided*, that any such shipper of two or more species of stock, in the same car or cars, shall ship the same at his own risk of injury solely by reason of such mixed shipment; otherwise at the risk of the carrier.

Sec. 1089. Minimum Weight of Car-load, Mixed Freight.—Twenty-four thousand pounds shall be deemed the minimum weight for a car-load of such mixed stock when such car is thirty feet long, and such minimum weight shall be more or less than twenty-four thousand pounds, in proportion as such car is more or less than thirty feet long; and no railway company, or agent for such company, shall charge, demand or receive any greater sum for the transportation of such car or cars of mixed stock or grain than is charged for the transportation of such car or cars when but one species of stock or one kind of grain is shipped therein: *Provided*, that said different species of stock or different kinds of grain, or articles of commerce and trade, which are loaded in said car or cars, do not exceed the maximum weight allowed by law and usage when but one species of stock or kind of grain is shipped in such car or cars.

Sec. 1090. Penalty—Duty of Commissioners and Attorney-General, etc.—Any railway company owning or operating a railway in this state, that shall refuse or deny

any of the rights and privileges granted to shippers by this act, shall forfeit and pay for every such refusal or denial, any sum not less than one hundred dollars nor more than five hundred dollars, together with costs of suit, including a reasonable attorney's fee. The penalties herein provided may be recovered by civil action in the name of the state of Missouri, and several counts may be joined in the same petition; and whenever the railroad commissioners shall, in any manner, come into possession of information which, in their judgment, warrants prosecution of any railroad company for violations of the provisions of this act, it shall be the duty of said commissioners immediately to cause suits to be commenced and prosecuted against such railroad company. Such suits and prosecutions may be instituted in any county in this state into or through which the line of the railroad company sued for violating this act may extend; and it shall be the duty of the attorney-general, and of any circuit attorney or prosecuting attorney of the circuit or county in which the said commissioners may desire such suit or prosecution instituted, to institute and prosecute the same, without delay, when so directed by the said commissioners; and such circuit attorney or prosecuting attorney shall receive for his services, out of the amount collected, the same compensation which is or may be allowed him by law for collections made on forfeited recognizances.

Sec. 1091. *Id.* Damages.—In addition to the penalties herein provided for any violation of the provisions of this act, the aggrieved party may recover of any such corporation or company three times the amount of loss or damage he may sustain by reason thereof.

Sec. 1092. Double-deck Cars.—All railroad companies, private companies or individuals, owning or operating a railroad or railroads in the state of Missouri, are required to furnish a sufficient number of double-decked cars for the shipment of sheep to supply the demand for such cars on

their respective lines, and to allow shippers to load both decks in said cars with sheep to the aggregate extent of (20,000) twenty thousand pounds, which cars, so loaded, shall be received and transported by such railroad companies, or private companies or individuals, as one car-load of stock, and it shall not be lawful for said railroad companies, private companies or individuals, to charge or receive for the transportation of a double-deck car of sheep more than the legal rate of freight allowed for the shipment of stock.

Sec. 1093. Penalty Under Preceding Section.—Should any railroad company, or private company or individuals, owning or operating a railroad or railroads in the state of Missouri, refuse or neglect to furnish cars as provided in the preceding section, it shall not be lawful for them to charge or receive for the transportation of a car of sheep more than one-half the legal rate of freight allowed for the shipment of stock.

Sec. 1094. Further Penalties.—Any railroad company or private company or individuals owning or operating a railroad or railroads in the state of Missouri, failing or refusing to comply with the provisions of sections 1092 and 1093, shall pay to the shipper not less than fifty dollars ($50) nor more than two hundred dollars ($200) for every failure or refusal to comply with said sections, to be recovered in any court of competent jurisdiction: *Provided*, that such railroad company, private company or individuals owning or operating a railroad in this state shall have the privilege of furnishing, instead of a double-decked car, two cars, for which only one rate shall be charged.

Sec. 1095. Notice of Advance of Rates.—No railroad company in this state shall advance its rates for carrying freight without having first given at least twenty days' notice of such change, by posting the schedule to which it is proposed to change the rates in at least three conspicuous

places on each of the freight and passenger depots belonging to the company proposing the change.

Sec. 1096. General Civil Penalty—Venue for Collection of.—Any person or company operating a railroad in this state who shall fail to comply with the provisions of the preceding section shall, for each offense, forfeit five hundred dollars to the use of the common school fund of the county, to be collected by civil action in the circuit court of any county through which the road belonging to such person or company may run. Such suit may be instituted by any person injured by such violation, or by the prosecuting attorney of the county where the suit is brought.

Sec. 1097. Shall Furnish Caboose.—Every individual, company or corporation owning, managing or operating, or who may hereafter own, manage or operate, any railroad or part of a railroad over bridges or through tunnels, as well as elsewhere in this state, who carry passengers, or whose duty it is to carry live stock as a common carrier, are hereby required to furnish to all shippers of live stock, having the right to accompany the same, a caboose or other suitable car for the transportation of such shipper or shippers to the actual place of unloading such shipments: *Provided*, that all such cabooses or cars on all such trains shall be furnished with a toilet-room for the accommodation of passengers. Any railroad corporation or company doing business in this state refusing to comply with the requirements of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars for each day's negligence or refusing to comply with the requirements of this section, after the enactment and passage of same, as required by law, and all moneys arising as such fines shall revert to the public school funds of this state.

Sec. 1098. Criminal Penalty.—Any individual, company or corporation violating the provisions of the pre-

ceding section shall, upon conviction thereof, be deemed guilty of a misdemeanor, and fined in any sum of not less than fifty nor more than five hundred dollars.

Sec. 1099. Freight May be Sold for Charges, When.—If any such railroad corporation shall have transported any freight which shall not be called for within six months, or on which the charges shall not have been paid for thirty days, they may sell the same, after giving not less than ten days' notice, by posting where such articles are stored, and also by publishing the same in the nearest local paper; and any sums of money received from the proceeds of such sale, after paying all charges, and expenses of sale, shall be paid into the county treasury for the benefit of the owner, if he shall thereafter appear; but if such money be not claimed within one year, it shall go into the school fund of the county.

Sec. 1100. Baggage Shall be Checked—penalties.—All baggage, when taken for transportation, shall be checked, if there is a handle, loop or fixture, so that the same can be attached, and a duplicate thereof given to the passenger or person delivering the same; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and, further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare, the same shall be refunded; and on producing such check, or if he have no check, on demanding his baggage, if it be not delivered to him, he shall recover the value thereof.

Sec. 1101. Freight Cars, etc., Shall Not be Placed in Rear of Passenger Cars—Penalty.—In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of passenger cars; and if they, or any of them, shall be so placed, the officer or agent who so directed or knowingly suffered such an arrangement, and the con-

ductor of the train, shall be deemed guilty of a misdemeanor, and be punished accordingly.

Sec. 1102. Bell and Whistle at Crossings—Penalty.—A bell shall be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street, or a steam whistle shall be attached to such engine and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall have crossed such road or street, under a penalty of twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railroad, to be sued for by the prosecuting or circuit attorney of the proper circuit, within ten days after such penalty was incurred, one-half thereof to go to the informer, and the other half to the county; and said corporation shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung or such whistle sounded as required by this section: *Provided, however*, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury.

Sec. 1103. Railroad Crossings, How Constructed, by Whom.—Every such corporation shall construct and maintain good and sufficient crossings, where its railroad crosses public roads or town streets, now or hereafter to be opened for public use, which crossings shall be constructed of the materials and in the manner following: On each side of each rail shall be laid and securely spiked to the cross-ties a plank of not less than ten inches in width, two inches in thickness, nor less than sixteen feet in length on all public roads, nor less than twenty-four feet in length on all streets in towns and cities, to be of good and sound timber; the

space between the inside planks shall be filled with macadam or gravel even with the top of the planks, and shall make good and sufficient approaches thereto, of equal width therewith and of easy grade; the same shall be covered with gravel or macadam to a depth of not less than six inches, and shall be substantially and properly joined up to the plank required to be laid on the outside of each rail: *Provided*, that such corporation may make such road or street to pass under its said railroad where the same can be done with equal convenience and safety to the traveling public. Every such corporation shall also cause boards to be placed, well supported by posts or otherwise, and constantly maintained at all crossings of public roads or streets (where gates are not provided) so as to be easily seen by travelers, and on each side of such boards shall be painted, in capital letters of at least the size of nine inches each, the words "railroad crossing." If such corporation fail to construct or maintain said crossings, or to put up boards as above provided, then the overseers, municipal authorities or parties having legal control or charge of said roads or streets shall notify such corporation of the necessity of the construction and erection thereof, which notice shall be in writing, and shall be served by delivering a copy of the same to the agent of the company most convenient to the crossing. Upon the service of such notice, if such corporation fail to construct said crossing or put up said boards within thirty days from the service of said notice, the parties having charge of said roads or streets may proceed to construct said crossing or put up said boards as herein provided, and shall be entitled to recover double the amount expended, together with all costs, in the name of the road district, county, municipal corporation, or other competent authority, at whose expense the said crossings were constructed, or the said boards erected, in any court of competent jurisdiction, from such corporation refusing or neglecting to

construct or erect the same. And such corporation shall also be liable for all damages resulting from such neglect to construct such crossing or erect such boards, said damages to be recovered in the name of the parties injured, in any court of competent jurisdiction. This section shall not apply to streets in cities and towns or villages, unless the corporation shall be required to put up such boards by the officers having charge of such streets.

Sec. 1104. Penalty for Injuring Railroad Property.—If any person or persons shall willfully do, or cause to be done, any act or acts whatever, whereby any building, construction or work of any railroad corporation, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened or destroyed, the person or persons so offending shall be guilty of a misdemeanor, and shall forfeit and pay to said corporation treble the amount of damages sustained by means of such offense.

Sec. 1105. Lawful Fences—Gates, etc., Who May Build—Trespassers.—Every railroad corporation formed or to be formed in this state, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle-guards, where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad; and until fences, openings, gates and farm crossings and cattle-guards as aforesaid shall be made and maintained, such corporation shall be liable in double the

amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle-guards. After such fences, gates, farm crossings and cattle-guards shall be duly made and maintained, said corporation shall not be liable for any such damage, unless negligently or willfully done. If any corporation aforesaid shall, after three months from the time of the completion of its road through or along the lands, fields or inclosures hereinbefore named, fail, neglect or refuse to erect or maintain in good condition any fence openings or farm crossings or cattle-guards as herein required, then the owners or proprietors of said lands, fields or enclosures, may erect or repair such fences, openings, gates or farm crossings, or cattle-guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction the cost of such fences, openings, gates, cattle-guards or repairs, together with a reasonable compensation for his time, trouble and labor in and about the construction of such fences, openings, gates or cattle-guards, or the making of such repairs, together with ten per cent. interest per annum thereon, from the time of the service of process upon such corporation in such suit: *Provided*, that before such repairs are commenced, such owner shall give five (5) days' notice, in writing, to the railroad company, by delivering a copy thereof to the nearest section foreman or station agent of such railroad company, that the railroad fence needs repairs at a place or point named in the notice, on the lands of such owner. And in every such action, if the plaintiff recover judgment, there shall be taxed as costs against the defendant an attorney's fee, to be fixed by the court or justice be-

fore which or whom the cause may be pending, at such sum as may be a reasonable compensation for all legal services rendered for plaintiff in the case, without regard to any agreement between plaintiff and his counsel as to fees; but such fee shall not be taxed so long as any appeal taken in such case shall remain undisposed of. And if any person shall ride, lead or drive any horses or other animals upon such road within such fences and guards other than a farm crossing, without the consent of the corporation, he shall, for every such offense, forfeit and pay a sum not exceeding ten dollars, and shall also pay all damages which shall be sustained thereby to the party injured. If any person not connected with or employed upon the railroad shall walk upon the track or tracks thereof, except where the same shall be laid across or along a publicly traveled road or street, or at any crossing, as hereinbefore provided, and shall receive harm on account thereof, such person shall be deemed to have committed a trespass in so walking upon said track in any action brought by him on account of such harm against the corporation owning such railroad, but not otherwise.

Sec. 1106. Insufficient Fence—Stock Killed—Damages.—Whenever any live stock shall go in upon any railroad or its right of way, in this state, and the said railroad is not at such place or places inclosed by a good fence on both sides of said railroad, such as is by law required, and such stock, by being frightened or run by any passing locomotive or train on said railroad, shall be injured or killed by or because of having run against the fence on either side, or into any culvert, bridge, slough or mire, or other object along the line of said road, the railroad company shall pay the owner of any such stock so injured or killed the damage sustained.

Sec. 1107. *Id.* Costs—Attorney's Fee.—If the owner of any live stock, including horses, mules, asses, cattle, sheep

and hogs, whenever the same shall have been injured or killed, as in section 1106 described, shall be compelled to bring suit in court to recover the damage so sustained, it shall be the duty of every court in which such suit may be heard to tax up a reasonable attorney's fee in such suit in favor of the complainant, if he recovers judgment, which shall be paid as other costs by the defendant.

Sec. 1108. Injury to Stock—Agreed Damages—to be Paid When.—Whenever any live stock shall be injured or killed by any railroad, so as to render the railroad liable under section 1106 of the Revised Statutes of 1899, or otherwise, and the owner of said live stock so injured or killed, or his authorized agent, and the agent or adjuster of the railroad, shall agree upon the amount of damage or damages sustained by the owner, the railroad shall, within forty days after said agreement, pay to the owner thereof, or his authorized agent, the amount of damage or damages so agreed upon.

Sec. 1109. Failure to Pay—Double Damages.—If any railroad neglect, fail or refuse to pay the owner or his authorized agent, the damage or damages agreed upon, as provided in section 1108 of this article, then the railroad shall be liable to the owner in double the amount of damage or damages agreed upon, to be recovered in any court of competent jurisdiction.

Sec. 1110. Ditches and Drains—Grain or Hay-stacks—right of Way—Kept Clear.—It shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, and of any corporation, company or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable ditches and drains along each side of the road-bed of such railroad, to connect with ditches, drains or water-courses, so as to afford sufficient outlet to

drain and carry off the water along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad, and in case such corporation, company or person shall fail or neglect to construct and maintain such ditches or drains within the time limited in this article, the county courts of the counties through which such railroad has been or may be located are hereby authorized and required, upon the petition of twenty land-owners of such county along the line of and contiguous to such railroad, to cause such ditches or drains to be constructed and maintained, and such court may maintain an acton against such corporation, company or person so failing to construct and maintain such ditches or drains in any court of competent jurisdiction, in the name of such county, and shall be entitled to recover all costs, expenses and damages incurred and accruing in the construction and maintenance of such ditches or drains. And it shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, to cause all dead or dry vegetation and undergrowth upon the right of way occupied by such railroad company to be cleared off and burned up or removed twice in each year, for the purpose of preventing the spread of fire, and the destruction of property, to wit: Between the 1st and 15th *days* of August, and between the 5th and 25th days of October, in each year; and any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty.

Sec. 1111. Fires From Engines—Damages.—Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad

corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

Sec. 1112. Construction on County Lines—survey to be Made, by Whom, for What Purpose.—In any case where a railroad is built along any county line, or where the line dividing any two or more counties is crossed and recrossed by any such railroad, in order to ascertain the exact amount of railroad bed and track which belongs within the lines of each of the respective counties, the county courts of each of such counties are hereby authorized and required to cause a survey of the same to be made, and it shall be the duty of the county courts to appoint the county surveyor, or some other suitable person, for each of their respective counties, who shall proceed jointly to survey, locate and establish the said line; and the said surveyor shall commence at the first intersection of the county line with said railroad, at either end of the same, as it may suit their convenience, and make a correct survey of the same, and measure correctly all portions of the bed and track of said railroad which they find on either side of said county line. They shall file in the office of the county clerk of each of their respective counties a correct plat of the said survey, with the notes of the same, showing the exact amount of road-bed which belongs within the lines of each of the respective counties; and in all cases hereafter, in the assessment and collection of the revenue on said railroads, the county court shall be governed by the said survey.

Sec. 1113. Shipments of Grain in Bulk.—Every railroad corporation which shall receive any grain in bulk for transportation to any place within the state shall transport and deliver the same to any consignee, elevator, warehouse or place to whom or to which it may be consigned and di-

rected: *Provided*, such person, warehouse or place can be reached by any track owned, leased or used, or which can be used by such corporation; and every such corporation shall permit connections to be made and maintained with its track to and from any and all public warehouses where grain is or may be stored. Any such corporation neglecting or refusing to comply with the requirements of this section shall be liable to all persons injured thereby for all damages which they may sustain on that account, whether such damages result from any depreciation in the value of such property, by such neglect or refusal to deliver such grain as directed, or in loss to the proprietor or manager of any public warehouse to which it is directed to be delivered, and costs of suit, including such reasonable attorney's fees as shall be taxed by the court. And in case of any second or later refusal of such railroad corporation to comply with the requirements of this section, such corporation shall be, by the court, in an action on which such failure or refusal shall be found, adjudged to pay, for the use of the people of this state, a sum of not less than one thousand nor more than five thousand dollars, for each and every such failure or refusal, and this may be a part of the judgment of the court in any second or later proceeding against such corporation. In case any railroad corporation shall be found guilty of having violated, failed or omitted to observe and comply with the requirements of this section, or any part thereof, three or more times, it shall be lawful for any person interested to apply to a court of competent jurisdiction, and obtain the appointment of a receiver to take charge of and manage such railroad corporation until all damages, penalties ,costs and expenses adjudged against such corporation for any and every violation shall, together with interest, be fully satisfied.

Sec. 1114. Consignments to Elevators, etc., Declared Temporary.—All consignments of grain to any elevator or

public warehouse shall be held to be temporary, and subject to change by the consignee or consignor, at any time previous to the actual unloading of such property from the cars in which it is transported. Notice of any change in consignment may be served by the consignee on any agent of the railroad corporation having the property in possession, who may be in charge of the business of such corporation at the point where such property is to be delivered; and if, after such notice, and while the same remains uncanceled, such property is delivered in any way from such altered or changed consignment, such railroad corporation shall, at the election of the consignee or person entitled to control such property, be deemed to have illegally appropriated such property to its own use, and shall be liable to pay the owner or consignee of such property the value of the property, and shall forfeit and pay to the owner or consignee the sum of twenty-five dollars, to be recovered by civil action before any court of competent jurisdiction; and no extra charge shall be permitted by the corporation having the custody of such property in consequence of such change of consignment.

Sec. 1115. Time Allowed for Removing Grain From Cars.—Any consignee or person entitled to receive the delivery of grain transported in bulk by any railroad shall have twenty-four hours, free of expense, after actual notice of arrival by the corporation to the consignee, in which to remove the same from the cars of such railroad corporation, if he shall desire to receive it from the cars on the track; which twenty-four shall be held to embrace such time as the car containing such property is placed and kept by such corporation in a convenient and proper place for unloading. And it shall not be held to have been placed in a proper place for unloading, unless it can be reached by the consignee or person entitled to receive it, with teams or other suitable means for removing the property from the car, and

reasonably convenient to the depot of such railroad corporation at which it is accustomed to receive and unload merchandise consigned to that station or place. Nothing herein contained, however, shall be held to authorize the changing of any consignment of grain, except as to the place at which it is to be delivered or unloaded; nor shall such change of consignment in any degree affect the ownership or control of property in any other way.

Sec. 1116. No Discrimination Allowed in Shipping Grain—Grain to be Weighed and Shortage Made Up.—Every railroad corporation chartered by or organized under the laws of this state, or doing business within the limits of the same, when desired by any person wishing to ship any grain over its road, shall receive and transport such grain, in bulk or otherwise, within a reasonable time, and load the same either upon its track, at its depot, or at any warehouse adjoining its track or side-track, without distinction, discrimination or favor between one shipper and another, and without distinction or discrimination as to the manner in which such grain is offered to it for transportation, or as to the person, warehouse or place to whom or to which it may be consigned; and at all statons where scales are required to be kept, at the time such grain is received by it for transportation, such corporation shall carefully and correctly weigh the same, and issue to the shipper thereof a receipt or bill of lading for such grain, in which shall be stated the true and correct weight, and such corporation shall weigh out and deliver to such shipper, his consignee or other person entitled to receive the same, at the place of delivery, the full amount of such grain, without any deduction for leakage, shrinkage or other loss in the quantity of the same, except that one-half of one per cent. shall be allowed for leakage, shrinkage or other loss on bulk grain. In default of such delivery, the corporation so failing to deliver the full amount of such grain shall pay to the person en-

titled thereto the full market value of any such grain not delivered at the time and place when and where the same should have been delivered.

Sec. 1117. Scales for Weighing by Car-loads to be Erected, Where—Penalty for Refusal.—At all stations or places from which the shipment of grain by the road of any such corporation shall have amounted, during the previous year, to fifty thousand bushels or more, such corporation shall erect and keep in good condition for use, and use in weighing grain to be shipped over its road, true and correct scales, of proper structure and capacity, for the weighing of grain by car-load in their cars. Such corporation shall carefully and correctly weigh each car upon which grain shall be shipped from such place or station, both before and after the same is loaded, and ascertain and receipt for the true amount of grain so shipped. If any such corporation shall neglect or refuse to erect and keep in use such scales, or shall, upon receipt by it of any grain for transportation, neglect or refuse to weigh and receipt for the same, as aforesaid, the sworn statement of the shipper or his agent, having personal knowledge of the amount of grain so shipped, shall be taken as true as to the amount so shipped; and in case of neglect or refusal of any such corporation, upon the delivery by them of any grain, to weigh the same as aforesaid, the sworn statement of the person to whom the same was delivered or his agent having personal knowledge of the weight thereof, shall be taken as true as to the amount delivered; and if by such statement it shall appear that such corporation has failed to deliver the amount so shown to be shipped, such corporation shall be liable for the shortage, and shall pay to the person entitled thereto the full market value of such shortage at the time and place when and where the same should have been delivered. In case any railroad corporation shall neglect or refuse to comply with any of the requirements of the pre-

ceding section, it shall, in addition to the penalties therein provided, forfeit and pay for every such offense, and for each and every day such refusal or neglect is continued, the sum of one hundred dollars, to be recovered in an action of debt before any court of competent jurisdiction, in the name of the state of Missouri—such penalty or forfeiture to be paid to the county in which the suit is brought—and shall also be required to pay all costs of the prosecution, including such reasonable attorney's fees as may be assessed by the court before whom the case may be tried.

Sec. 1118. Grain and Freight Received at all Junctions—Trains—Penalty.—Every railroad corporation organized or doing business under the laws of this state, or authority thereof, shall receive and deliver all grain and other freight consigned to its care for transportation at the crossings and junctions of all other railroads, canals and navigable rivers; and shall, at all cities and towns along the line of their railroad, having a population of two hundred inhabitants or more, construct and maintain switches and freight houses for the receipt and delivery of grain and other freight that may be tendered such railroad corporation for transportation; and shall stop at least one train daily thereat to receive and unload freight. Any violation of this section shall render any such railroad corporation subject to the same penalty as contained in section 1114.

Sec. 1119. Private Swithes, Where—Penalty.—Any person or corporation owning or operating any coal, lead, iron or zinc mine, or any other ore, or any saw-mill or other industry, whenever in the opinion of the railroad commissioners the amount of business is sufficient to justify the same, near or within a reasonable distance of any railroad track, may, at their or its expense, build and keep in repair a switch leading from such railroad to such mine, saw-mill or other industry; such railroad company shall be required to furnish the switch-stand and frog and other neces-

sary material for making connection with its track, and shall make such connection—the party owning such mine, saw-mill or other industry to pay the actual cost thereof; and if any railroad company, after demand is made, shall refuse to furnish said material for making said connection and put the same in place, or after the building of such switch shall fail or refuse to operate the same, such railroad company failing and refusing shall forfeit and pay to the party or corporation aggrieved the sum of five hundred dollars for each and every such offense, together with a reasonable attorney's fee, to be recovered by civil action in any court of competent jurisdiction; and every day of such refusal on the part of any railroad company to operate such switch as aforesaid, after demand is so made, shall be deemed a separate offense.

Sec. 1120. Upon Failure to Furnish Cars, Shippers may Furnish Them—Penalty for Failure to Return.—Whenever any railroad corporation shall fail, neglect or refuse to furnish, within a reasonable time after demand of a station agent, sufficient cars to supply any party desiring to ship property, then such party shall have the right to furnish cars, which shall be switched and hauled to their destination without unreasonable delay or discrimination in any manner between such cars and cars belonging to the corporation or any other person. Any party furnishing cars as aforesaid shall pay to the railroad corporation a reasonable compensation for the service rendered, and in case an agreement cannot be reached as to such compensation, the railroad commisioners shall fix the same, and when such compensation has been so fixed, it shall be *prima facie* evidence that the same is reasonable. Any railroad company failing or refusing to transport and return the cars furnished by said party or corporation mentioned in this section, shall pay to the party or corporation aggrieved the sum of five hundred dollars for each and every such offense,

together with a reasonable attorney's fee, to be recovered by civil action in any court of competent jurisdiction, and every day of such refusal on the part of any railroad company to transport and return such cars as aforesaid after demand is made, shall be deemed a separate offense.

Sec. 1121. No Officer of Railroad Shall Furnish it with Supplies on His Own Account—Penalty.—No president, director, officer, agent or employe of any railroad company, or other corporation operating a railroad, shall hereafter be interested in any manner, directly or indirectly, in furnishing materials or supplies to such company; nor shall any such officer, agent or employe of any railroad company, or other corporation owning, controlling or managing a railroad, be interested, directly or indirectly, in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or operated by the corporation or association of which he is an officer, agent or employe. Any president, director, officer, agent or employe of any such railroad company who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a term of not less than three months nor more than one year, or by both such fine and imprisonment, and each day any such violation continues shall be a separate offense.

Sec. 1122. Power to Construct Roads, Connect with, Intersect or Cross Other Lines—Duty to Receive Each Other's Freight, Etc.—Any railroad corporation or association, organized for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states; and shall have the right, with its road, to intersect, connect with or cross any other railroad,

and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination.

Sec. 1123. Swith Frogs to be Blocked.—All companies or corporations, lessees or other persons, owning or operating any railroad or part of railroad in this state, are hereby required on or before the first day of November, eighteen hundred and ninety-one (1891), to adopt, put in use and maintain the best known appliances or inventions to fill or block all switches, frogs and guard-rails on their roads, in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employes or other persons from being caught therein. Any company or corporation, lessees or other person, owning or operating any railroad or part of railroad in this state, who shall fail to do any act or thing in this section required to be done, or shall cause any act or thing not to be done, or shall aid or abet any such omission, shall be deemed guilty of a violation of this law, and shall forfeit and pay the sum of ten dollars ($10.00) for every such offense, and each day shall constitute a separate and distinct offense.

Sec. 1124. Next Preceding Section to be Given in Special Charge to Grand Jury.—At every session of courts of record of this state having criminal jurisdiction, the judge thereof shall direct and charge grand juries to make special inquiry as to violation of this law.

Sec. 1125. Penalty.—When any employe or other person shall be maimed or killed, by reason of the non-compliance with the provisions of section 1123 then in any suit for damages which may be instituted against any railroad company, corporation or lessee for such maiming or killing, proof of contributory negligence or carelessness on the part of any employe or other person so maimed or killed shall not relieve such railroad company, corporation or lessee from liability.

Sec. 1126. Freight, Charges on Regulated.—No railroad corporation organized or doing business in this state, under any act of incorporation or general law of this state now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its said road for any distance, any larger or greater amount, as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith, which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void.

Sec. 1127. Railways Declared Public Highways, and Companies Common Carriers—Discrimination Prohibited—Penalty.—Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. No railway company, corporation or association shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and indi-

viduals, in favor of either, by abatement, drawback or otherwise, nor shall any such company, corporation or association, nor any lessee, manager or employe of any such company, corporation or association make any preference between the parties aforesaid in furnishing cars or motive power, for the purpose aforesaid. Any company, corporation or association, or manager, lessee or employe, violating the provisions of this section, shall forfeit and pay to the party injured the whole amount of such transportation charged, to be recovered before any court of competent jurisdiction: *Provided*, that excursion or commutation tickets may be issued at special rates.

Sec. 1128. Railways Declared Public Highways, and Companies Common Carriers.—All railways heretofore constructed or that may hereafter be constructed in this state, are hereby declared to be public highways, and all individuals, companies, corporations, trustees, receivers and lessees running and operating cars and trains upon such railways, for the transportation of freight and passengers upon such railways are hereby declared to be common carriers. All charges made for any services rendered in the transportation of freight on such railways, including the receiving, delivering, storing and handling of such property, shall be reasonable and just; and all unreasonable and unjust charges for such service are prohibited and declared unlawful.

1129. Discrimination Prophibited.—If any such common carriers shall directly or indirectly, by any special rate, rebate, draw-back or other device, charge, demand, collect or receive from any person or persons, firm or corporation a greater or less compensation for any service rendered in the transportation of any kind of property upon such railroad within this state than it charges, demands, collects or receives from any other person or persons, firm or corporation for doing for him or them a like

service in the transportation of a like kind of property under substantially like circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.

Sec. 1130. Unjust Discrimination Defined and Prohibited—Car-load Lots.—It shall be unlawful for any such common carrier to charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car of several cars of a like class of freight over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions; or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight, under a car-load, of a like class of freight over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions; or to charge, collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight over the same railroad, for the same distance, in the same direction, under substantially similar circumstances and conditions. All such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this article: *Provided, however*, that for the protection and development of any new industry within this state, such railroad company may grant concessions in special rates for any agreed number of car-loads, but such special rates as aforesaid shall first be approved by the board of railroad commissioners, and a copy thereof filed in the office thereof.

Sec. 1131. Id. In Mixed Freight—Car-load Lots.—It shall be unlawful for any such common carrier to charge, collect, demand or receive more for the transportation of any car of freight composed of several different classes of merchandise or freight, transported for the same owner to the same destination, than it at the same time charges for the transportation of a car-load of freight of the highest class of merchandise or freight contained in said car-load of mixed freight: *Provided, however,* that such common carrier shall not be liable for any damages or loss in transportation growing out of or that is the natural and direct result of shipping the said several classes of freight in one car.

Sec. 1132. Id. Less Than Car-load Lots.—It shall be unlawful for any such common carrier to charge, collect, demand or receive more for the transportation of less than a car-load of freight when shipped to one owner, to one destination, than it at the same time charges for a car-load of like freight, or when the car is loaded with freight of several classes, more than it charges for the transportation of a car-load of the highest class of freight shipped in said car of mixed freight: *Provided,* that nothing in this section shall be construed to forbid a railway company from transporting freights in car-load lots at a less rate per hundred pounds than it charges, demands and receives per hundred pounds for like class of freight in quantities less than a car-load.

Sec. 1133. Discrimination Between Persons or Localities Prohibited.—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any par-

ticular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business.

Sec. 1134. Discrimination—Long and Short Haul.—It shall be unlawful for any such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction: *Provided, however*, that nothing contained in this section shall apply to the carriage, storage or handling of property, either free or at reduced rates, for the United States, for the state of Missouri, or for any fair, exposition, religious, scientific, benevolent or charitable purposes.

Sec. 1135. Pooling Prohibited.—It shall be unlawful for any common carrier subject to the provisions of this article to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 1136. Schedule of Maximum Rates Posted in Depots—Duty of Commissioners.—Every such common carrier shall print and keep for public inspection schedules show-

ing the rates for freight which such carrier has established and which are in force at the time upon the railroad or railroads operated by it as defined in section 1128. Said rates shall be reasonable and just, and shall not in any case exceed the maximum rates which are or which may hereafter be established by law. Schedules as aforesaid shall contain the classifications of freight in force upon such railroad or railroads, and if there be any rules or regulations which change, determine or affect any part of the aggregate of such rates, fares and charges, such rules and regulations shall accompany such schedule. Copies of such schedules, also such rules and regulations, if any, shall be kept posted in every depot or station upon any such road, in such place where the same can be conveniently inspected by every person interested in the same. Copies of such schedules, also such rules and regulations, if any, shall be filed with the railroad commissioners of the state of Missouri, and from the date of such filing, the rates, fares and charges specified in such schedule, not being in excess of any statutory maximum rates now or that may hereafter be in force, shall be deemed the established rates, fares and charges of such common carrier until the same is changed as in this article provided. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any such common carrier in compliance with the requirements of this article, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares and charges will go into effect; and the proposed changes shall be plainly indicated upon the schedules in force at the time, and kept for public inspection in like manner as herein provided. Reductions in such published rates, fares and charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall be imme-

diately publicly posted, and the changes made shall be immediately plainly indicated upon the scedules in force at the time and kept for public inspection, and copies of the schedules containing such changes shall be forthwith filed with said railroad commissioners. Such changed schedules shall become the established schedules from the date of such public notice until changed as herein provided for changing schedules of rates, fares and charges. When any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this article, the same not being in excess of any statutory maximum rates now or that may be hereafter in force, it shall be unlawful for any such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of property or for any service in connection therewith than is specified in such published schedules of rates, fares and charges as may at the time be in force, except as herein may be specifically permitted. It shall be the duty of the railroad commissioners to see that all schedules of rates prepared and adopted by common carriers are reasonable and just, and they may, upon complaint of any person, or upon their own motion and without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just.

Sec. 1137. Joint Tariffs, Filed Where.—In all cases where freight passes over continuous lines or routes within this state, such as is in section 1128 described, operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint rates, fares or charges for such continuous lines or routes, copies of such joint tariffs shall also be filed with the railroad commissioners of this state, and shall be published in such manner as may be directed by the commissioners.

Sec. 1138. Commissioners to Enforce Rates, Make Schedules, When.—It shall be the duty of said railroad commissioners to see that such schedules of joint rates, fares and charges are reasonable and just, and that such schedules of joint rates, fares and charges shall be observed by all the common carriers who are parties to the same. But no such common carrier, party to any such joint tariff, shall be liable for the failure of any other such common carrier, party thereto, to observe and adhere to the rates, fares and charges as made and published. If any such common carrier shall neglect or refuse, for a period of thirty days, to file or publish its schedules of rates, fares and charges, as provided for in this article or any part of the same, it shall be the duty of said railroad commissioners to make out and print a schedule or schedules of reasonable rates for such common carrier, and deliver copy or copies of the same to such common carrier. Such delivery shall be by messenger, by registered letter or by any sheriff in this state. It shall be the duty of every sheriff to serve and deliver the same whenever directed thereto by an order of said board of railroad commissioners, and shall return the same in like manner and with like effect to said board as in case of summons in civil suits. Such common carriers for whom such schedules shall be made by said board shall keep the same posted in their depots and stations, as required in this article for schedules made out by them in compliance with law; and the provisions of this article concerning the schedules required to be made by such commissioners, and the changing thereof, shall apply to the schedules made by said board as provided in this section. The costs of preparing, printing and delivering said schedules shall be paid by such common carrier, and shall be specified in an order of said board entered of record, and a copy of said order, certified by the secretary of said board, shall in any suit be *prima facie* evidence of the amount

which ought to be paid, and may be recovered in an action in the name of the state, at the relation of said board, before any court or justice of the peace in this state having jurisdiction of the amount thereof. A copy of such schedules so made by said board, certified by the secretary of said board, shall, in proceedings wherein is involved the reasonableness and justness of the charges and rates of such commissioners, be *prima facie* evidence that rates therein fixed are reasonable and just.

Sec. 1139. Rates Continuous—Breakage of Bulk not to Affect Rates.—It shall be unlawful for any such common carrier as is described in section 1128 to enter into any combination, contract or agreement to prevent, by change of time schedule, carriage in different cars, or by any other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination within this state, and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or evade any of the provisions of this act: *Provided*, that nothing herein contained shall be construed as requiring any railroad now belonging to class C, and connecting or crossing a trunk line or any branch thereof, to take and accept for its share and part of the earnings on freight that may be so received from such trunk line or any branch thereof, or shipped from its line over such trunk line or any branch thereof, a *pro rata* part of the total freight earnings from the point at which such shipment is received to the place of destination.

Sec. 1140. Penalty—Triple Damages for Violation of this Act.—In case any such common carrier shall do or

cause to be done any act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act or thing in this act required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of this act, together with a reasonable attorney's fee, to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case.

Sec. 1141. Damages, Proceedings for.—Any person or persons claiming to be damaged by any common carrier by reason of any violation of the provisions of this act may bring suit therefor in any circuit court of any county or city into or through which the line operated by such common carrier enters or passes, and such person or persons may make complaint as hereinafter provided to the railroad commissioners. And if any proceeding is commenced under the provisions of this act, either in a court or before the said railroad commissioners, the tribunal before which such proceeding shall be pending may compel any director, officer, receiver, trustee, agent or employe of the common carrier complained of in such suit to attend as a witness and testify in such proceeding, and may also compel the production of the necessary books, papers and documents of such common carriers.

Sec. 1142. Penalty by Forfeiture for Violation of Act. Any such common carrier in section 1128 described, or any of its officers, agents or employes, including receivers, trustees and lessees, who alone, or with any other person, company or corporation, shall do or cause to be done, or shall permit to be done, any act, matter or thing in this act prohibited, or declared to be unlawful, or shall aid or abet therein, or fail to do any act or thing in this act required to be done, or shall cause any act or thing not to be done which this act directs shall be done, or shall aid or abet any

such omission, shall be deemed guilty of a violation of the law, and shall forfeit a sum not exceeding five thousand dollars for each and every offense.

Sec. 1143. Commissioners to See to Enforcement of Articles—Investigate Complaints.—It shall be the duty of the railroad commissioners of this state to see that the provisions of this article are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of this article have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint and determine the truth of the same, and for that purpose said railroad commissioners shall have power to summon witnesses and to require the production of any necessary books, papers or written documents in possession of the common carrier complained of, and to this end written or printed communications, signed by any one of such railroad commissioners and attested by the secretary of such commission, under seal and sent by registered letter through the mail or delivered personally to the person addressed, shall be deemed a sufficient service. Witnesses so summoned by said commissioners shall be entitled to the same fees as are allowed in circuit courts in civil cases. In case of the failure or refusal of any person or persons so summoned to attend and testify at the time and place specified in said summons, or to produce any designated books, papers or documents required or called for, as provided for in this section, such person or persons failing shall be deemed guilty of contempt, and said railroad commissioners shall have power to impose such penalties as the circuit court of this state may impose for like offenses; and if any common carrier, or any officer, agent or servant thereof, shall willfully or knowingly obstruct or prevent

said railroad commissioners from making such investigations as are authorized by this act, they shall be deemed guilty of a misdemeanor, and on conviction thereof, may be punished by fine not exceeding five hundred dollars. For the purpose of conducting such examination, such railroad commissioners, or any of them, shall have the power to administer oaths or affirmations, and they shall prescribe such rules and regulations for the conduct of such investigation as they may deem best to enable them to arrive at the facts, but in every case a full and fair hearing shall be accorded to all parties having an interest in such case. (Such railroad commissioners may institute any inquiry, on their own motion, in the same manner and to the same effect as though complaint had been made.) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.)

Sec. 1144. Forfeitures, How Recovered and Disposed of.—The forfeitures and penalties herein provided for shall go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the state of Missouri, at the relation of the board of railroad commissioners to the use of said fund, in any county where the complainant resides, if in the state, and if not, then where the offense may occur, or into or through which the railroad operated by the common carrier offending, or on which it operates, may run. It shall be the duty of the circuit or prosecuting attorney, and such additional counsel residing in such county as said board may employ, to prosecute the same when directed by said board, and the attorneys prosecuting such suit shall receive for their services, out of the amount collected by the suit, the compensation allowed by law for collections made on forfeited recognizances. The attorney-general shall assist in the prosecution when directed by the board of railroad commissioners. And all suits instituted under the provisions of

this act shall have precedence in all courts having jurisdiction thereof over all other suits therein except criminal actions.

Sec. 1145. Findings of Commissioners—Order—Attorney-General may Prosecute on.—Said railroad commissioners shall render a decision in every case investigated in accordance with the facts thereby ascertained, and which shall embrace a summary statement of such facts. In case that said railroad commissioners shall find in any case that such common carrier has been guilty of any violation of this article, they shall incorporate such finding in said decision, and also an order to such common carrier to desist immediately from such violation. In case they shall find that any injury or damage to any person or persons making complaint as aforesaid has accrued by reason of such violation, they shall award the amount thereof, and incorporate in their decision a statement thereof, and the names of the person or persons so damaged, together with an order to such common carrier to pay the same to such person by a date to be therein specified. In case that any such decision shall be against any such common carrier, it shall pay all costs of the investigation, which costs shall be specified in the decision of the said commissioners, together with an order to pay to them immediately the amount thereof. A copy of such decision, signed by the commissioners and attested by their secretary, and sealed with their seal, shall be furnished to each party in interest, either personally, by registerd letter, or in such other manner as the commismissioners may deem sufficient. Said commissioners shall make and preserve a record of all proceedings in every investigation, and of their decision therein, which shall be a public record, and open to the inspection of any citizen of this state. And if such common carrier shall fail or refuse to pay the amount adjudged to be due, on or before the day specified aforesaid, said commissioners may at their

own instance, and shall when requested by the person or persons injured or damaged, cause the attorney-general or the prosecuting attorney of the proper county to institute suit against such common carrier in the name of the state of Missouri, at the relation and to the use of the party injured or damaged, to enforce the payment thereof, together with costs; and upon the trial of such cause a certified copy of the award and decision of said commissioners shall be received as *prima facie* evidence of each and every fact therein stated; *and provided however*, that the person or persons to whom such damages are due may institute suit for same in his own name. If the result of such examination be in favor of such common carrier, the amount of such costs shall be by the commissioners certified to the state auditor, who shall issue a warrant for the payment thereof out of any money in the state treasury appropriated for that purpose.

Sec. 1146. Further Duty of Commissioners on Complaints.—Where complaint is made as herein provided, and the commissioners are satisfied that if true it contains a substantial charge that some one or more of the provisions of this act have been violated or are being violated, they may proceed informally by letter or otherwise to investigate and settle the matter complained of with the common carrier of whom complaint is made, or they may proceed to make a preliminary investigation as to the truth of the charge; if satisfied that there is sufficient ground for complaint, and that the matters complained of cannot be adjusted without a formal hearing, they shall fix a day for such hearing and notify both parties, which notice shall be in writing, either by letter or some other form, such as said commissioners may deem sufficient. At such hearing both parties shall have full opportunity to be heard. The commissioners shall have the power to adopt all such necessary rules and regulations as to method of proceedings,

including the making up of issues, taking testimony, preserving the same, hearing arguments, making orders and awards, granting continuances and rehearings, and all such other matters as may be necessary to a full and final disposition of the complaint. If upon any investigation had by the railroad commissioners under the provisions of this article, such railroad commissioners shall find from the testimony of witnesses or other evidence that anything has been done or omitted to be done by any such common carrier in violation of the provisions of this act, or of any law of this state cognizable by said railroad commissioners, or that any common carrier proposes to do or omits to be done anything in violation of the provisions of this act, it shall be the duty of such railroad commissioners forthwith to cause a cause a copy of their finding in respect thereto to be delivered to such common carrier, with a notice to such common carrier to cease or desist from such violation within a reasonable time, to be specified by such railroad commissioners.

Sec. 1147. Id. Notice to Corporation—on Complaint, How Served.—When the complaint specified in section 1143 shall allege that unreasonable charges are made by any such common carrier or carriers subject to the provisions of this act, for the transportation of any freight thereby, or that the rates specified upon the schedule or schedules of rates made by such common carrier or carriers, in obedience to the provisions of this act, are unjust, unreasonable or extortionate, it shall be the duty of the board of railroad commissioners, if in their opinion the facts alleged present a just cause of complaint, and if upon hearing there appears to said board to be reasonable grounds for believing that the facts so alleged are true, and if in the opinion of the board the public good will be promoted by an examination thereof, to give notice in writing to the common carrier or carriers against which such complaint shall have

been made of the fact and nature thereof, and shall specify in such notice the charges by it made, and the rates specified upon it. schedules which are alleged to be unjust, unreasonable or extortionate. Such notice shall be attested by the secretary of said board, under the seal thereof, and shall be served upon such common carrier or carriers against which such complaint is made, by delivering a copy thereof at the general office of such common carrier or carriers, to any person in charge thereof, or to any agent thereof at any depot or station thereof, or on which such common carrier or carriers operate, by any messenger appointed by said board who would be a competent witness in a suit at law in this state, or by any officer authorized to serve process, or by sending the same by registered letter to such common carrier or carriers at such general office, or to any such agent having charge of such depot or station as aforesaid.

Sec. 1148. Id. Further Action on Complaint.—If such common carrier or carriers shall not, within ten days after the service of such notice as aforesaid, change or modify such charges or rates specified in such notice in a manner and to an extent satisfactory to said board, then said board may proceed to examine and investigate the matters alleged in said complaint, and for that purpose may give notice to the parties making, and against whom is made, such complaint—said notice to be served as provided for the service of notices as aforesaid, wherein it shall require such common carrier or carriers to show cause before said board at any place within this state in said notice specified, and upon a date not less than ten days after the service thereof, why said charges or rates should not be modified or changed.

Sec. 1149. Hearing on Complaint—Order.—If upon such examination it shall appear to said board, upon a full and fair hearing of the parties to said complaint, that the

facts therein alleged are true, and that such charges or rates should be changed or modified, then said board shall, by an order entered upon the records thereof, find and determine what would be reasonable and just charges or rates for the transportation by such common carrier or carriers complained of, freight of the class for which such charges or rates complained of were made; and a certified copy of such finding and order so made under the seal of said board, attested by the secretary thereof, shall be delivered to the complainants and such common carrier or carriers against which such complaint is made, by registered letter or otherwise, as may be prescribed by the rules of said board. The rates or charges so found and determined by said order, proven by a copy thereof certified as aforesaid, shall, in any and all proceedings wherein is involved the reasonableness and justness of the rates and charges by such common carrier or carriers, be *prima facie* evidence that the same are reasonable and just. Such order may be revoked or modified and renewed from time to time by said board, but no revocation or modification thereof shall go into effect until ten days after the order therefor shall be made.

Sec. 1150. Proceedings When Order of Commissioners is Disobeyed—Circuit Court—Enforce or Renew Order—Proceedings.—Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employe thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this state into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and

the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents or servants in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct, and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioner involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or other-

wise, against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundren dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the state, in the same manner that appeals are taken from such courts in this state in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the

docket and take precedence of any other case upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney-general and governor of the state, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case.

Sec. 1151. *Id.* Court May Establish Rate by Judgment.—Upon any hearing by any court of any matter involving the reasonableness or unreasonableness of the rates charged or proposed to be charged by any such common carrier in its schedule or schedules of rates, the court shall make a finding as to what in its opinion is a reasonable and just rate of charge to be made by such common carrier, and shall thereupon enter judgment in accordance with such finding, and make orders enforcing the same.

Sec. 1152. *Id.* Court May Modify Order.—Any finding and judgment made under the provisions of the preceding section may be reviewed and changed or modified by the court rendering the same at any time, upon the application by petition of any common carrier affected thereby, or upon like application by the railroad commissioners; but no such application shall be considered by the court unless at least ten days' notice of the time and place of making the same, and a copy of the petition, be served on the commissioners or common carrier, by or on behalf of the party making such application.

Sec. 1153. Act Applies to All Shipments, How.—All the provisions of this article shall be held to apply to ship-

ments made from any point within the state to any point within the state ,whether the transportation of the same shall be wholly within this state or partly within this and adjoining state or states.

Sec. 1154. Commissioners Liable to Mandamus and fine.—In case that the railroad commissioners shall fail or refuse to perform any act or duty required of them by this article, they shall be liable to proceedings in *mandamus* to compel the performance of such act or duty, and in addition thereto shall be liable to such fine as the court may impose, not exceeding five hundred dollars. A majority of the railroad commissioners shall constitute a quorum to do business, and any act or decision of any two of them shall be taken as the act or decision of the commissioners.

Sec. 1155. Appropriation to Carry Out Act.—To defray the necessary expenses of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the state auditor, issued upon requisition of the railroad commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid.

Sec. 1156. This Article Not to Repeal Any Other Law. This article is not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws.

Sec. 1157. Express Companies to Have Facilities.—Whenever any express company authorized to do business in the state of Missouri shall desire to carry on their express business along and on the line of any railroad in the state, and shall make application to the officers or managers of any railroad for cars, transportation and other proper facilities to carry on their said business, it shall be the duty of

the said railroad company to make such arrangement and provide such facilities as will enable said express company to carry on and transact its said express business, and to receive and discharge freight, valuables, money, jewelry and other property entrusted to it for transportation, at all the stations and stopping places on the line of said railroad, and it shall be no excuse for refusing such facilities that another express company is already furnished with facilities and is actually doing business on the said railroad.

Sec. 1158. *Id.* All Express Companies Served Alike. Any railroad company owning or operating a railway in this state, that shall refuse or deny any of the rights and privileges granted to any other express company to the express company so applying for facilities to carry on their said business on and along the line of the said railroad, or shall charge, take from or receive any greater or different toll, charge or rent for the privilege of carrying on their said express business, or for like services, than it at the same time charges or receives from any other express company, shall forfeit and pay for every such refusal, denial of facilities to carry on their said business, or for discrimination in favor of any one express company against another, any sum not less than five hundred dollars nor more than one thousand dollars, to be recovered by civil action in any court of competent jurisdiction.

Sec. 1159. *Id.* Duty of Commissioners.—The railroad commissioners are hereby required to take jurisdiction of all violations of the provisions of this act, and see that competition in the express business is not prevented by the refusal of said railroad companies to provide facilities to more than one express company to carry on their express business on and along the line of the said railroads at the same time; and whenever the railroad commissioners shall in any manner come into possession of information which, in their judgment, warrants prosecution of any railroad

company for preventing competition in the express business by refusing to grant facilities, on equal terms, to two or more express companies on and along the line of their railway, or for the violation of any of the provisions of this act, it shall be the duty of the said commissioners immediately to cause suits to be commenced and prosecuted against such railroad company. Such suits may be instituted in any county in the state into or through which the line of the railroad company sued for violating the act may run, and it is hereby made the duty of the attorney-general and of any prosecuting attorney in the state, at the request of the railroad commissioners, to commence and prosecute any actions the said commissioners may desire to institute for the violation of any of the provisions of this act.

Sec. 1160. Penalty for Overcharges on Freight.—Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof; and any officer, agent or employe of any such railroad corporation who shall knowingly or willfully violate the provisions of this article shall be liable to the penalties prescribed in this section.

Sec. 1161. Corporate Powers to Cease, When.—If any corporation formed under this article shall not, within two years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and shall not within one year thereafter expend thereon not less than ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in

ten years from the time of filing its articles of association as aforesaid, its corporate existence and powers shall cease: *Provided*, that if a portion of their road shall be finished and in operation, they shall continue their corporate existence, with power to hold and manage the portion of their road so constructed, and for no other purpose.

Sec. 1162. Existing and Future Corporations Governed by This Article.—All existing railroad corporations within this state, and such as may be hereafter chartered or formed, shall, respectively, have and possess all the powers and privileges contained in this article; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained.

Sec. 1163. Railroad Corporation Defined.—The term "railroad corporation" contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state.

Sec. 1164. Union Depots—How Constructed—Corporation for—Railroad Company may Construct.—In order to facilitate the public convenience and safety in the transmission of goods and passengers in and in the neighborhood of large cities, from one railroad to another, and to prevent the unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, any number of persons, not less than five, or any such number of persons, not less than five and any railroad company or companies, are hereby authorized to form themselves into a corporation under the general laws of this state, relating to private corporations, for the purpose of constructing, estabishing and maintaining a union station for passengers or freight depots, or for both, in or in the neighborhood of any city of this state, with the necessary offices and rooms convenient therefor, and the appurtenances thereto, and, for

that purpose, may make an sign articles in which shall be stated the number of years the same is to continue, the city in which the same is to be located, the amount of the capital stock of said company, which shall not exceed ten millions of dollars, the amount of each share of stock, the names and places of residence of its directors who shall manage its affairs for the first year and until others are chosen in their place, the number of its directors which shall not be less than five nor more than thirteen, and shall also state the amount of stock taken by each subscriber. And any railroad company may construct, build, operate and maintain a union station in, or in the neighborhood of any city of this state, for passengers or freight depots, or for both, with the necessary offices and room convenient therefor, and the appurtenances thereto, and shall have like powers in connection with any such union station or depots, or both, as are possessed by union depot companies formed under this act.

Sec. 1165. Powers of Such Corporation or Railroad Company.—Every corporation formed under the preceding section, and every railroad company which may build and operate a union station or depot under said section, shall, in addition to the general powers conferred by the laws of this state, in relation to corporations, have power: First, to take and hold for the purposes mentioned in said section, such real estate, and railroad and other property, as it may acquire by conveyance to said corporation, and such real estate as it may acquire under the provisions of said previous section, by condemnation; second, to take, occupy, and condemn any lands and real estate needed for the establishment of such union station or depot, or the terminal facilities in connection therewith, and the same proceedings shall be had therefor as provided by law relating to the appropriation and valuation of land taken for tele-

graph, macadamized, graded, plank, or railroad purposes, so far as applicable thereto, and, when so condemned, the said land and any interest therein shall belong to such corporation as owner thereof; third, to hold and acquire, by purchase or condemnation, any such real estate as may be requisite or necessary for the purpose of constructing, erecting, maintaining and operating terminal facilities for the use of the railroads occupying or having access to such union station or depot, and also to build, maintain and operate terminal railroads and terminal facilities to be used in connection with such union station or depot, and to build, maintain and operate railroads and bridges over navigable streams, or otherwise, and to construct tunnels as and for approaches to said union station or depot, and to such extent as may be deemed necessary by the corporation operating and maintaining such union station or depot, and for such purposes to acquire property and extend its terminal facilities beyond the limits of this state, and also to transport, or permit to be transported persons and property over such railroads and bridges as may be built by any corporation operating hereunder, and to charge compensation therefor; fourth, to have the right to lay the necessary tracks across, over, upon and under such streets of the city in which said station or depot is to be constructed, and across, over, upon or under such roads of the county or counties into which such terminal facilities are to be extended, as may be necessary in order to make the necessary connections with all such railroads as are to have access to said station or depot, and also to construct such station or depot, across, under, over or upon any such streets or roads: *Provided*, that nothing herein contained shall be construed to authorize the construction of such tracks, or station or depot, not already located, across, under, over or upon any street in a city or a road of any

county, without the assent of the corporate authorities of such city or the county court of such county; fifth, from time to time, to borrow such sums of money as may be necessary for the construction, completion, equipment, maintenance, finishing, operating or repairing of such station or depot, and the terminal facilities connected therewith, or for the purpose of funding its floating debt, or refunding its bonded debt, or for the purpose of making additions, alterations or betterments to its property, authorized by its charter, or for making any connection with any railroad which is to have access to such union station or depot, or with any bridge or tunnel connected with or forming a part of such terminal facilities, or for the construction, alteration or repair of any such bridge or tunnel connected with or forming a part of such terminal facilities, and for any or all of the above named purposes, may issue, sell, hypothecate and dispose of its corporate bonds for such amounts, and at such prices as may by such corporation be deemed proper for obtaining any amount so borrowed, and may mortgage its corporate property and franchise or franchises, or any part, or parts, thereof, to secure the payment of such bonds or of any debts so contracted by such corporation for any of the purposes aforesaid; sixth, to open, from time to time, books of subscription to the remainder of the capital stock not taken by the subscribers to the articles of association: *Provided, however*, that any company organized under this act shall not have the power by condemnation to acquire the property now owned by any other union depot company or railroad company and used or needed for its corporate purposes, but any company formed hereunder shall have the same right and power to intersect, connect with and cross other railroads with its tracks and to join and unite its tracks with those of similar companies or railroad companies as is by

the constitution and laws of this state conferred upon railroad companies, and the same method of ascertaining the compensation to be made therefor shall apply as is provided in the case of railroad companies under similar circumstances.

Sec. 1166. Stock-yards and Cars—Cleaned.—It shall be unlawful for any railroad or stock-yard company or corporation, or any agent, servant or employe of any railroad or stock-yard company or corporation, to unload, between the first day of June and the first day of November of each year, or empty or clean out, any pen or stock-yard, or any car or cars in which any cattle, horses, mules, sheep, swine or other live stock have been confined or shipped, on any but lands inclosed by a lawful fence and not in or adjacent to any springs or running stream of water. And it is hereby made the duty of every railroad corporation in this state to thoroughly clean all its cars for the transportation of live stock and other property, and to furnish all cars to the person or persons ordering same at the point of shipment, thoroughly cleaned and in good condition for the transportation of such stock, goods or material to be shipped or transported. Any railroad company, corporation or person offending against the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum of not less than fifty nor more than five hundred dollars.

Sec. 1167. Penalty for Violation of Preceding Section. In every case where any animal belonging to another shall become diseased or die by reason of the non-compliance of any railroad company or corporation with the provisions of the preceding section, the owner of such animal may recover against such railroad company or corporation the full amount of all damages, together with all costs of prosecution.

Sec. 1168. Time for the Completion of Certain Roads Extended.—The time within which any railroad company now organized under the general laws of this state relating to railroads and railroad companies, shall finish its railroad and put the same in operation, shall be extended three years beyond the expiration of ten years from and after the filing of its articles of association in the office of the secretary of state: *Provided*, that at the expiration of said ten years, such railroad company shall have finished and put in operation thirty per cent. of the whole length of its proposed road; and such railroad company shall have and possess all the rights to complete, maintain and operate such road, to which it would have been entitled had its road been finished and put in operation within the aforesaid ten years: *Provided*, that this section shall be operative for the purpose of the completion, maintenance and operation of such railroads only, and for no other purpose, and that at the expiration of ten years from the time such companies were incorpor ed, all rights that such railroad companies might have during the period of ten years next after their incorporation to the subscription of stock in aid of the uncompleted portion of such railroads, subscribed by any individual, county, town, township or part of township in this state, or by any other association whatever, shall cease, and such subscription shall become void: *Provided*, that nothing in this section shall be so construed as to bind or hold any person, county, city town or township, or any part of said county, city, town or township liable on any subscription heretofore made to any railroad company whose rights are extended by the provisions of this section: *and provided further*, that this section shall not apply to any road whose articles of incorporation shall have been filed ten years or more prior to the passage of this section, nor shall any railroad company be entitled to the provisions of this section until it shall have filed with the sec-

retary of state an unconditional release, duly executed and acknowledged by the proper officer or officers of such company, discharging all individuals, counties, towns, cities, townships and parts of township from all stock or aid subscribed, voted or promised in aid of the construction or maintenance of such railroad in the counties through which said company may fail to complete its road by the 29th day of June, 1879.

Sec. 1169. Duty of Railroad Companies to Maintain Connecting Switches, When.—It shall be the duty of every railroad corporation or corporations owning or operating any railroad or railroads in this state, upon an order from the railroad and warehouse commissioners so to do, upon petition to said railroad and warehouse commissioners by not less than ten persons who may deem themselves interested, to construct and maintain spurs or switches at any place in this state where any railroad or railroads cross each other at grade, so as to permit shipments and loaded cars to be transferred and transported from any one of such railroads so crossing another into the custody of the railroad so crossed.

Sec. 1170. Live Stock to Have Precedence in Shipment over Dead Freight.—Whenever dead freight and live stock come in competition with each other for shipment at any such railroad crossing, it shall be the duty of the corporation contracting or engaged in shipping live stock, to ship the live stock without delay, and to give such preference in being moved over dead freight so being shipped from the place of such crossing, or arriving at any such point from any other place on any one of such roads so crossing each other.

Sec. 1171. Penalty for Failure to Comply with Preceding Section.—Any railroad corporation or corporations owning or operating any such railroads so crossing each

other as aforesaid shall build, construct and maintain such spurs and switches as provided by the provisions of this act, within ninety days after the receipt of any such order from the railroad and warehouse commissioners, and to maintain the same for the purposes of this act, and for failure so to do, such corporation, so being ordered as aforesaid, shall for each offense pay to the county in which such crossing may be, for the use of the school fund of such county, the sum of five hundred dollars, to be recovered by civil action by such county.

Sec. 1172. Depots to be Maintained at Grade Crossings, When.—The board of railroad and warehouse commissioners shall have authority, whenever, in the opinion of the board, the public service demands it, to require railway companies, whose tracks cross each other at grade, to construct and maintain joint depots and stations at such crossings, upon sixty (60) days' notice to the railroad companies to be affected by such order.

Sec. 1173. Formation of Corporation to Build Line From County Seat to Railroad or River.—For the sole purpose of connecting county seats in the state of Missouri with railroads, or with the Missouri or Mississippi rivers, where such connection does not already exist, it shall be lawful for any number of citizens of such county, not less than five in number, to form a corporation, with whatever amount of capital stock may be deemed necessary by such citizens, for the purpose of building an electric railroad from such county seat to some other railroad, or to the Missouri or Mississippi rivers, as before stated.

Sec. 1174. Powers and Duties.—Such incorporation shall possess all the rights, privileges and powers given to any railroad corporation by the laws of this state, and in addition thereto, shall not be required to have any greater amount of stock than to the incorporators thereof may seem

necessary; *and provided further*, that said corporation shall have power to create whatever amount of bonded indebtedness such corporation may deem necessary.

Sec. 1191. Roads Classified.—All railroads in the state of Missouri are hereby divided into three classes, to be known as class A, class B and class C. Class A shall include all through or trunk line railroads. Class B shall include all of the branch roads owned, leased or occupied by such through or trunk line railroad companies or corporations. Class C shall include all other railroads or parts of railroads owned, leased or occupied, or which may hereafter be owned, leased or occupied in this state, either wholly or in part.

Sec. 1192. Passenger Charges Regulated.—Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In class A, not exceeding three cents per mile, and in classes B and C not exceeding four cents per mile: *Provided*, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under, than one-half of the rate above prescribed: *and provided further*, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

Sec. 1193. Freight Classified.—All freights hereafter transported upon any railroad or part of a railroad in this state are hereby divided into four general classes, to be designated as first, second, third and fourth classes, and into seven special classes, to be designated as class D, E, F, G, H, I and J. Class D shall comprise all grain in car-

loads. Class E shall comprise flour in lots of fifty barrels or more, and lime in lots of twenty-four barrels or more. Class F shall comprise salt in lots of sixty barrels or more, and cement, water-lime and stucco in lots of twenty-four barrels or more. Class G shall comprise lumber, lath and shingles, in car-loads. Class H shall comprise live stock, in car loads. Class I shall comprise agricultural implements, furniture and wagons. Class J shall comprise coal, brick, sand, stone, railroad ties and cord-wood, and all heavy fourth class articles, in car-loads; and in addition to the several articles in the said special classes, shall be added other articles as and in the manner hereinafter prescribed, except in classes D, E, G and H; and all articles not before enumerated or subsequently set into said classes as hereinafter provided, shall be placed in and belong to the four general classes, to be classified by the railroad commissioners hereinafter to be provided.

Sec. 1194. Freight Charges Regulated.—No individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad, designated in section 1191 as in classe A, B or C, shall charge for or receive a greater or higher rate for carrying articles named in the several special classes herein designated, than is hereinafter provided for, namely: Class D, not exceeding six cents per one hundred pounds for the first twenty-five miles, and not exceeding four cents per hundred pounds for the second twenty-five miles, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof, unless the fraction shall be less than thirteen miles, in which case the rate shall be one cent for said fractional part, unless the whole distance be over two hundred miles, when no greater rate than one-half cent per hundred pounds shall be received for each twenty-five miles over said first mentioned two hundred

miles. Class E, not exceeding twelve cents per barrel for the first twenty-five miles, and not exceeding eight cents per barrel for the second twenty-five miles, and not exceeding four cents per barrel for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed two cents per barrel for said fractional part, unless the whole distance be over two hundred miles, when no greater rate than one cent per barrel shall be charged for each additional twenty-five miles over said two hundred miles. Class F, not exceeding fifteen cents per barrel for the first twenty-five miles, and not exceeding six cents per barrel for the second twenty-five miles, and not exceeding three and one-half cents per barrel for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed one and one-half cents per barrel for said fractional part. Class G, not exceeding eight dollars per car-load for the first twenty-five miles, and not exceeding five dollars per car-load for the second twenty-five miles, and not exceeding two dollars per car-load for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed one and one-half dollars per car-load for such fractional part. Class H, not exceeding ten dollars per car-load for the first twenty-five miles, and not exceeding seven dollars per car-load for the second twenty-five miles, and four dollars per car-load for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed two dollars per car-load for such fractional part. Class I, not exceeding eleven dollars per car-load for the first twenty-five miles, and not exceeding six dollars per car-load for the second twenty-five miles, and not exceeding three dol-

lars per car-load for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed one dollar and fifty cents per car-load for such fractional part. Class J, not exceeding eight dollars per car-load for the first twenty-five miles, and not exceeding six dollars per car-load for the second twenty-five miles, and not exceeding two and one-half dollars per car-load for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, in which case the rate shall not exceed one dollar per car-load for such fractional part. In computing the rates of freight according to the provisions of this article, the distance shall be computed from the point where it is received in this state, notwithstanding it may pass from one road to another.

Sec. 1195. Freight Charges for Melons.—No individual, company or corporation, owning, operating, managing or leasing any railroad or part of a railroad, designated in section 1191 as in Class A, B or C, shall charge for or receive a greater or higher rate for carrying watermelons, muskmelons or canteloupes than is hereinafter provided for, namely: Not exceeding eight dollars per car-load of 25,000 pounds for the first twenty-five miles, and not exceeding five dollars per car-load for the second twenty-five miles, and not exceeding one dollar per car-load for each additional twenty-five miles, and all excess in weight to be charged for at the same rates. In computing the rates of freight, according to the provisions of this section, the distance shall be computed from the point where it is received in this state, notwithstanding it may pass from one road to another.

Sec. 1196. Penalty for Illegal Charges, Etc.—In no instance shall any such individual, company or corporation, lessee or other person, charge or receive any greater rate of

compensation for carrying freight or passengers than hereinbefore provided, and any individual, company or corporation violating, or in any way evading the provisions of this article, shall forfeit all right to recover or receive any compensation whatever for the service rendered wherein such violation is attempted; and every agent of any such corporation, lessee or other individual operating any railroad within this state, who shall refuse to receive for transportation over the road for which he is agent, in the usual way, any of the articles hereinbefore mentioned, on account of the compensation hereinbefore prescribed being too low, or receiving any such articles of freight, shall charge or attempt to charge for the transportation of the same, any greater sum than herein fixed, or shall in any manner violate or attempt to violate or evade the provisions of this article, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall pay a fine of not exceeding two hundred dollars for each and every offense, and the injured party shall have a right of action against said agent, or against the railroad company, or other persons operating the railroad, or both, in which case he shall be entitled to recover three times the amount taken or received from him in excess of the rate prescribed by this article.

Sec. 1197. Jurisdiction of Courts, Etc.—Justices of the peace shall have concurrent jurisdiction with the circuit court in all cases of prosecutions for a violation of this article, with full power and authority to impose fines, and to the same extent as the circuit court, in all cases where the amount claimed does not exceed two hundred dollars: *Provided*, that either party shall have the right to appeal as in all other cases tried before a justice of the peace; and justices of the peace shall have jurisdiction in all civil cases under this article, whenever the amount claimed does not exceed two hundred dollars.

Sec. 1198. Railroad Commissioners—Selection—Qualifications.—The governor shall, immediately after the passage of this act, and before the adjournment of the present general assembly, by and with the consent of the senate, appoint three railroad commissioners, who shall hold their office until the first day of January, 1877, and until successors are elected and qualified, and at the general election to be held in 1876, there shall be elected by the qualified voters of the state three railroad commissioners, one of whom shall be elected for two years, and one of whom shall be elected for four years, and one of whom shall be elected for six years; and at each general election, every two years thereafter, there shall be one railroad commissioner elected, who shall hold his office for six years, and until his successor is elected and qualified. But no person owning any bonds, stock or other property in any railroad company, or in the employ of any railroad or transportation company, or in any way or manner personally interested therein, shall be so appointed or elected; *and provided*, that the governor shall fill by appointment all vacancies that may occur in the board of railroad commissioners by death, resignation or removal from office; but no such appointment shall be for a longer time than till the next general election thereafter.

Sec. 1199. Commissioners to Enforce Reasonable Rates.—It is hereby made the duty of the railroad commissioners to exercise constant diligence in informing themselves of the rates and charges of common carriers engaged in the transportation of freight from points in this state to points beyond its limits, and from points in other states to points in this state; and whenever it shall come to the knowledge of the railroad commissioners, by complaint made to them or in any other manner, that the rates charged by any such common carrier on inter-state business are un-

just, excessive or unreasonable, or that such rates discriminate against the citizens of this state, the commissioners shall cause the facts thereof to be embodied in a complaint setting forth, in detail, the respect in which the rate complained of is unjust, excessive or unreasonable, and shall file said complaint with the inter-state commerce commission and demand a hearing thereof, and shall thereafter furnish testimony in support thereof, and diligently present the facts upon which such complaint is based. At the time of filing such complaint, the railroad commissioners shall give notice thereof to the attorney-general, who shall prosecute the same to final determination before the said inter-state commerce commission.

Sec. 1200. Powers of Commissioners, Etc.—Upon complaint being made and filed against any railroad company, said commissioners shall have power to administer oaths or affirmations, to send for persons and papers, under such regulations as they may prescribe, and shall at any and all times have access to any and all books and papers in any railroad office kept for and used in said railroad office by any rilroad company in this state, and if the charges are sustained, the cost shall be paid by the railroad company, but if not sustained, then the cost shall be paid by the party making the complaint.

Sec. 1201. May Issue Subpoenas, Etc.—How Enforced.—Said railroad commissioners, in making any examination, as contemplated in this article, shall have power to issue subpoenas for the purpose of obtaining information pursuant to this article for the attendance of witnesses, by such rules as they may prescribe; and in case any person shall willfully fail or refuse to obey such subponea, it shall be the duty of the circuit court or any judge thereof in any county, upon the application of the said commissioners, to issue an attachment for such witness and compel such

witness to attend before the commissioners, and give his testimony upon such matters as shall be lawfully required by such commissioners; and said court shall have power to punish for contempt, as in other cases of refusal to obey the process and order of such court.

Sec. 1202. Penalty for Disobedience of Process, Etc.—Any person who shall willfully neglect or refuse to obey the process of subpoena isued by said commissioners, to appear and testify as therein required, shall be deemed guilty of a misdemeanor, and shall be liable to arraignment and trial in any court having competent jurisdiction, and on conviction thereof, shall be punished for such offense by a fine of not less than twenty nor more than five hundred dollars, or by imprisonment not exceeding thirty days, or both, at the discretion of the court before which such conviction shall be had.

Sec. 1203. Reports Shall be Printed.—The annual reports of the railroad commissioners made to the governor, as is now or as may hereafter be provided by law, shall be printed at the expense of the state in manner provided by law for the printing of other public documents. Three thousand copies are hereby authorized to be printed and bound annually, under the direction of said commissioners, and to be by them properly distributed throughout the state.

Sec. 1204. Commissioners May Classify Freight, When.—Said railroad commissioners shall have power to classify all articles of freight transported on any railroads or parts of railroads owned, leased or occupied in the state, except the articles in the special classes D, E, G and H, placing said articles in either of the general classes herein provided for, or in any of said special classes, except D, E, G and H; and are further empowered and authorized to reduce said rates on any of said railroads or parts of rail-

roads, either in general or special classes, whenever, in their judgment, it can be equitably done.

Sec. 1205. Powers and Duties of Commissioners as to Inspection of Tracks, Etc.—The railroad commissioners shall, as often as they may deem it necessary, carefully examine the condition of the several railroads of this state; and it shall be the duty of said railroad commissioners, whenever they have reasonable grounds to believe—either on complaint or otherwise—that any of the tracks, bridges or other structures of any railroads in this state are in a condition which renders any of them dangerous or unfit for the transportation of passengers with reasonable safety, to inspect and examine the same; and if, on such examination, in their opinion, or in the opinion of a majority of them, any such track, bridges or other structure or works are unfit for the transportaion of passengers with reasonable safety, it shall be their duty to give to the superintendent or other executive officer of the company working or operating said defective tracks, bridge or other structure, notice of the condition thereof, and of the repairs necessary to place the same in a safe condition; and may also order and direct the speed of trains over such dangerous and defective track, bridge or other structure, until the said repairs are made, and the time within which the repairs shall be made by the company; and if any such superintendent or executive officer aforesaid, receiving such notice and order, shall willfully neglect, for the period of two days after receiving such notice and order, to direct the proper subordinate officers to move the passenger trains over such defective track, bridge or other structure, at the speed prescribed by the commissioners, or if any engineer, conductor or other employe of such company shall disobey such order, every such superintendent, conductor, engineer or other employe shall be deemed guilty of a misdemeanor,

and, on conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or be imprisoned in the county jail of the proper county for a period not exceeding one year, or both, at the discretion of the court; and in case the disregard of the instructions of the commissioners shall cause any accident whereby human life shall be lost, or passengers maimed or wounded, the said superintendent of the said company and the engineer and conductor in charge of such train shall severally be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned in the penitentiary for a period of not less than two nor more than ten years; and the commissioners shall have power to wholly stop the running of passenger trains over such defective track, bridge or other structure; and they are hereby required, in case any company fails to repair such track, bridge or other structure within the time required, to give notice of such fact in some newspaper having a general circulation along the line of said railroad, to the traveling public. And, furthermore, said commissioners may recover from said railroad company the sum of one thousand dollars for each day that expires after the time fixed by the commissioners for the repair of such defective track, bridge or other structure, for such neglect to repair the same, unless good and sufficient cause can be shown for such failure to repair such defective track, bridge or other structure, to be recovered before any court having competent jurisdiction, for the use and benefit of the state of Missouri, after paying the costs of the advertisement herein provided for.

Sec. 1206. Decision of Commissioners Binding on Companies—Penalty, Etc.—Any individual, company or corporation owning, operating, managing or leasing and railroad or part of any railroad in this state, shall be bound by the decision of the aforesaid commissioners with ref-

erence to the rates so fixed by said commissioners, and every violation by any individual, company or corporation charging a greater or higher rate shall be deemed a misdemeanor, and, on conviction thereof, shall forfeit and pay a fine of not less than twenty nor more than two hundred dollars for each and every oeffnse; and the injured party shall have a right of action against said individual, company or corporation before any court of competent jurisdiction in this state; and he shall be entitled to recover three times the amount taken or demanded in excess of the rates prescribed by this article, or by the commissioners acting under the provisions of this article; but nothing herein contained shall be so construed as in any manner to abridge or control, or to in any way authorize the commissioners to abridge or control or regulate the rates for freight or passengers charged by any railroad company in this state for carrying any freight or passengers which come from beyond the limits of this state, and to be carried through or across this state, but the said railroad and transportation companies shall posses the same power and right to charge such rates for carrying such through freight and passengers as they possessed before the passage of this article.

Sec. 1207. Oath and Bond of Commissioners.—Before entering upon the duties of his office, each of the said commissioners shall make, subscribe and file with the secretary of state the following oath:

I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Missouri, and that I will faithfully discharge the duties of railroad commissioner according to the best of my ability; that I am not a stockholder in any railroad or freight company, nor in any way, directly or indirectly, in the employment of or engaged in the management of any railroad or transportation company.

Each of said commissioners shall enter into a bond, with security, to be approved by the governor, in the sum of twenty thousand dollars, conditioned upon the faithful performance of his duty.

Sec. 1208. Salaries and Contingent Expenses of Commissioners.—The said commissioners shall each receive for their services three thousand dollars per annum, payable monthly out of the state treasury; they shall be furnished with an office, which shall be at the state capital, and at the expense of the state; and the necessary contingent expenses of said office shall be paid monthly out of the state treasury, from any money appropriated for contingent expenses of railroad commissioners: *Provided*, that such appropriation shall not exceed eight hundred dollars in any one year. The said commissioners shall employ a secretary at a saalry of fifteen hundred dollars per annum, to be paid monthly out of the state treasury; they shall also adopt and use an official seal; and a copy of any of their proceedings, or of any documents on file in their office, duly certified, shall be taken as evidence in the courts of this state.

Sec. 1209. Construction of Article.—Nothing contained in this article shall be so construed as to release any such railroad corporations enumerated in this article from liability for damages, as provided by the laws now in force.

Sec. 1210. Commissioners to Require Railroads Operated by Competing Companies to Make Reasonable Daily Connections, When.—Whenever two or more railroads run and operated in this state by competing companies shall connect with or intersect each other, and where a passenger depot shall be located, fail to run their passenger trains so as to connect with each other, it shall be the duty of the railroad and waxehouse commissioners to require such companies to so run and operate their passenger trains as to make reasonable daily connection with each other in the

arrival and departure of their trains so as to cause as little delay as practicable for passengers, when, in the judgment of said commissioners, such connection can be made without serious detriment to the business of such companies, or either or any of them, and where such connection will not seriously conflict with other more important or necessary connections on the line of either or any of said roads.

Sec. 1211. Commissioners Authorized to Act, How and When.—In enforcing the provisions of this act, the commissioners are fully authorized to determine how such connection shall be made, when the same cannot be agreed upon by the companies interested, and to settle and determine all differences between said companies in relation thereto, making all their proceedings under this act a matter of record.

Sec. 1212. Commissioners to Institute Inquiry—Notice, etc.—Upon written complaint by three or more adult male resident sof any county in the state, where a line of railroad is being run and operated, which connects with or intersects another road, that such roads fail to make connection inrunning and operating their passenger trains, filed with said board of commissioners, said board shall institute inquiry as to the public necessity and feasibility of such connection, and shall give at least ten days' notice to some officer or agent of the companies interested, and to one or more of the complainants, of the day fixed for the hearing of the complaint.

Sec. 1213. Commissioners' Acts—Order of Record—Notice to Company.—Upon such investigation, if the commissioners shall be of the opinion that the companies should operate their roads so as to make connection as provided in this act, they should make an order of record to that effect, and give the companies notice of such order, and naming a day in such order and notice when such connection shall begin.

Sec. 1214. Penalty for Failure to Obey Orders.—Any railroad company or companies failing and refusing to make connection of their trains as required by the order of the railroad commissioners and this act, or shall otherwise violate the provisions of this act, shall be deemed giulty of a misdemeanor and shall be punished by a fine not less than one hundred ($100) dollars, nor more than one thousand ($1,000) dollars for each and every day they shall fail to make connection of their trains as required by said order, and this act, to be recovered by indictment or information preferred in the county where such roads connect with, or intersect each other, and where such connection is required to be made; and a certified copy of the order of the board of railroad and warehouse commissioners at the hands of the secretary shall be received in all courts as evidence of the same.

Sec. 1215. Commissioners to Require Companies to Connect Tracks, When.—The railroad and warehouse commissioners are hereby authorized and empowered, whenever in their judgment the public interest demands it, to require railroad companies whose rights of way join or whose tracks are within one hundred feet of each other, the conditions being such as to enable a connection to be made between such tracks, on a grade common to each, and the necessary right of way obtained or granted, to connect their tracks so as to receive and interchange cars, one company with and from the other, when requested by shippers desiring to ship freight in car-load lots, from a point on one line to a point on the line of another company.

Sec. 1216. Notice to Companies of Intention to Make Order.—Before said commissioners shall issue an order requiring a connection to be made as provided in section 1210 of this article, they shall give the railroad companies interested at least ten days' notice of their intention to issue

such order, so that if desired by said companies a hearing of the matter may be had by the commissioners.

Sec. 1217. Expenses of Making Connection, How Divided.—The cost of connection authorized by this article shall be divided by the commissioners between the companies whose tracks are connected in such proportion as the aforesaid commissioners may find to be equitable.

Sec. 1218. Penalty for Failure to Comply with Order. For failure on the part of any railroad company to comply with an order of the commissioners requiring a track connection to be made as provided in section 1210 of this article, such railroad company shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined twenty-five dollars per day for each and every day after the expiration of the time designated by the said commissioners in their order for the completion of such connection; the said penalty to be recovered in an action in the name of the state of Missouri at the relation of the said commissioners, before any court of competent jurisdiction in the county where such neglect or failure may occur.

Sec. 1219. Other and Inconsistent Acts Repealed.—An act entitled "An act authorizing the railroad and warehouse commissioners to require railroad companies to make connection and interchange cars," approved March 15, 1897, and all other acts or parts of acts inconsistent with this act are hereby repealed.

Supreme Court of the United States.

No. 11.—October Term, 1901.

The Missouri, Kansas and Texas Railway Company, Plaintiff in Error,
vs.
H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri.

In error to the Supreme Court of the State of Missouri.

[November 11, 1901.]

This case involves the question of removal from a State to a Federal court.

The State of Missouri has a body of statutes for the regulation of railroads. By one section a board of railroad commissioners is created. To this board is committed the duty of supervising the conduct and charges of railroads, of hearing and deciding complaints against them, and making such orders as the circumstances require. Section 1143, Rev. Stat. Mo. (1899), identical with section 2646, Rev. Stat. Mo. (1889), contains this provision:

"Sec. 1143. Commissioners to See to Enforcement of Article—Investigate Complaints.—It shall be the duty of the railroad commissioners of this State to see that the provisions of this article are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of this article have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint and determine the truth of the same."

The section also authorizes the commissioners to summon witnesses, to punish for failure or refusal to attend or testify, declares that any common carrier wilfully or knowingly obstructing or preventing the commissioners from making such investigations shall be deemed guilty of a misdemeanor and punished by a fine. Other sections provide for penalties and forfeitures. In section 1144, the same as section 2647, Rev. Stat. 1889, is this clause:

"Sec. 1144. Forfeitures, How Recovered and Disposed of.—The forfeitures and penalties herein provided for shall go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the State of Missouri, at the relation of the board of railroad commissioners to the use of said fund."

Section 1150 (sec. 2653, Rev. Stat. 1889) reads as follows:

"SEC. 1150. Proceedings when Order of Commissioners is Disobeyed—Circuit Court—Enforce or Renew Orders—Proceedings.—Where the complaint involves either a private or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent of employe thereof, shall violate, refuse or neglect to obey any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any circuit court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents or servants, in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment

thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the State, in the same manner that appeals are taken from such courts in this State in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

Under the authority of these statutes, upon a hearing after complaint and notice, the railroad commissioners found that the railway company was charging excessive and illegal rates for travel over what is known as the Boonville Bridge across the Missouri River, and made and entered of record an order directing it to discontinue such charges. This order was dated July 22, 1895. The railway company not complying with the order, a suit was instituted on August 17, 1895, in the circuit court of Cooper County, Missouri, by such commissioners, setting forth the facts and praying process, mandatory or otherwise, to restrain the defendant from further continuing to violate the law and the order of the commissioners. The company in due time filed a petition for removal to the Circuit Court of the United States, alleging that it was a corporation created and existing under the laws of the State of Kansas and a citizen of that State, and that the plaintiffs were citizens of the State of Missouri. No question was made as to the sufficiency of the petition and bond in respect to any formal matter. The State court refused to order the removal, Notwithstanding which the railway company took a transcript of the record and filed it in the Federal court, where a motion to remand was made and overruled. (97 Fed. Rep. 113.) The State court, after refusing to order the removal, proceeded with the hearing of the case, the railway company declining to take any part therein. On such hearing a decree was entered in accordance with

the petition of the railroad commissioners. This decree was appealed to the Supreme Court of the State, and by that court on June 30, 1899, affirmed. (151 Mo. 644.)

Mr. Justice BREWER delivered the opinion of the Court.

The single question presented for our consideration is whether the railway company was entitled to remove this suit from the State to the Federal court. The State court refused the removal, and the Federal court, on the other hand, denied a motion to remand. Under these circumstances this court has jurisdiction to determine whether there was error on the part of the State court in retaining the case. (*Removal Cases*, 100 U. S. 457; *Stone* v. *South Carolina*, 117 U. S. 430; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.)

On the face of the record the railway company was entitled to a removal. The plaintiffs were citizens of Missouri, the State in which the suit was brought. The railway company was a citizen of the State of Kansas. There was, therefore, diverse citizenship, the defendant a citizen of another State than that in which the suit was brought petitioning for removal, and the removal appers perfect in form.

But it was held by the Supreme Court of the State of Missouri that it was proper to go behind the face of the record and inquire who was the real party plaintiff, and, making such examination, that court decided that the real party plaintiff was the State of Missouri. If that conclusion be correct then no removal in this case was justifiable, because a State is not a citizen within the meaning of the Removal Acts; *Stone* v. *South Carolina*, (117 U. S. 430;) *Germania Ins. Co.* v. *Wisconsin*, (119 U. S. 473;) *Postal Telegraph Cable Co.* v. *Alabama*, (155 U. S. 482.)

Was the State the real party plaintiff? It was at an early day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party, it is the party named in the record. (*Osborn* v. *United States Bank*, 9 Wheat. 738.) But that technical construction has yielded to one more in consonance with the spirit of the amendment, and in *In re Ayers*, (123 U. S. 443,) it was ruled upon full consideration that the amendment covers not only suits against a State by name but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the amendment has since been followed. That amendment refers only to suits brought against a State. But applying the same principles of construction to the Removal Acts and to cases in which it is claimed that the State, though not the nominal is in fact the real party plaintiff, it may fairly be held that the

State is such real party when the relief sought is that which enures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross*, (38 Fed. Rep. 161.) There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the State, and it was held by the Circuit Court for the Eastern District of New York that the action was one in which the real party plaintiff was the State. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.

But this case is not like *Ferguson* v. *Ross*, and does not come within the rule above stated. It is not an action to recover any money for the State. Its results will not enure to the benefit of the State as a State in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate.

It is true that the State has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State as an artificial person. (*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362–390.)

While not controverting these general propositions, the Supreme Court of the State was of the opinion that the State had a direct, pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because were the litigation pushed to the extreme there might be penalties imposed which would when collected pass into the school fund of the State. We quote its language:

"This section of the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons: First, 'the board of railroad commissioners;' second, 'any person or company interested in such order or requirement.' Now, while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the first class, its board of railroad commissioners. In such

actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute out of any money in the treasury not otherwise appropriated, and is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action, but because of its pecuniary interest in the judgments which may be obtained and which when pushed to the final extremity of execution may result in the payment of penalties, not directly into the State treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools, to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State in addition to its governmental has a real pecuniary interest in the subject-matter of this controversy, and that the suit is being prosecuted for its benefit in every sense and is not subject to removal to the United States court, and we so hold."

We are unable to concur in these views. Whatever may be the result of any subsequent or ancillary proceeding the direct object of this suit is to obtain a decree of the court commanding the railway company to comply with the order of the commissioners. Such a decree is similar to the ordinary decrees of a court of equity, and it is familiar that a court of equity may enforce compliance with its orders and decrees by penalties upon the delinquents. So that if this possible pecuniary result is sufficient to make the State the real party plaintiff it would follow that in Missouri the State is the real party plaintiff in every equity suit, because in every equity suit such penalties may be imposed.

Neither can it be held that the State's voluntary assumption of the costs of the litigation when the decree is adverse to the railroad commissioners makes it the real party plaintiff. That is simply an incidental matter and does not determine its relations to the suit any more than its payment of the salary of the judge, fees of jurors or any other expenses of the litigation. We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the State of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it the party to whom alone the relief sought enures and in whose favor a decree for the plaintiff will effectively operate.

The judgment of the Supreme Court of the State of Missouri is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice GRAY was not present at the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.